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O F T H E
H I S T O R Y
O F
M O R T M A I N ;

T H E S T A T U T E S R E L A T I V E T O
C H A R I T A B L E U S E S ;

A N D A F U L L E X P O S I T I O N O F T H E L A S T
M O R T M A I N A C T ,
(9 G E O . I I . c . 3 6 .)

C O M P R I S I N G T H E L A W A S I T N O W S T A N D S R E L A T I V E T O
D E V I S E S , B E Q U E S T S , T A X E S , L E A S E S , V I S I T A T I O N ,
A N D D I R E C T I O N O F

P U B L I C C H A R I T I E S .

By A. HIGHMORE, jun.
Author of the DIGEST of the DOCTRINE of BAIL.

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MDCCLXXXVII.

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SUCCESSION THE W

W I S T O R Y

O R T M A I N

PARITABLE USES

O R T M A I N A C T

THE OIL ABILITIES

THE OIL ABILITIES

TO THE RIGHT WORSHIPFUL

RICHARD CLARK, Esq. F.A.S: S.S.A.

ONE OF THE SENIOR ALDERMEN OF THIS CITY,

PRESIDENT OF CHRIST'S HOSPITAL,

TREASURER OF BRIDEWELL AND BETHLEM

HOSPITALS,

ONE OF THE

VICE PRESIDENTS OF THE SMALL-POX AND

INOCULATION HOSPITALS :

&c. &c. &c.

WORTHY SIR,

ANY other tribute than that of the sincerest gratitude for the honour conferred upon me, by your kind patronage of this work, would be superfluous from so humble an individual, while the general acknowledgment of your ability and exemplary conduct, not only in all the trusts committed to your charge, but in that most important

portant one of chief magistrate of this metropolis, is so amply testified by the deserved and warmest regard of all your fellow citizens, and members of your profession.

I am therefore the more deeply sensible of the present and every former instance of your condescending notice; and while, for fear of offending, I suppress those expressions of praise, in which every one would concur, I cannot refrain from declaring with how much unfeigned veneration and respect I have always participated in that public esteem so justly due to your character.

I have the honour to be,

Worthy Sir,

Your most obedient

Humble servant,

Bury Court, St. Mary Axe;
4th June, 1787.

ANTH. HIGHMORE, jun.

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INTRODUCTION.

THE design of the following pages is, to offer a concise view of that part of our history and of our laws, which while it advances the merit of our ancestors, will serve to shew the humanity of their descendants; and that the distresses of our fellow creatures, although always, and in all countries awakening to the benevolent heart, yet in this country, have in all times been the peculiar care of the legislature and of the people: if the vigilance and stern justice of the one, has at any time repressed the zeal and mistaken piety of the other; that very vigilance, and that justice when diffused into the domestic individual, have ever signalized and ennobled the hearts of our rulers.

As history which delineates the character of men, is a material elucidation of the conduct and measures they have pursued; it can need but little apology, why, in a chronological detail of the acts which have been passed to restrain alienations in *Mortmain*, a succinct view of the times and causes which gave rise to them should be

also introduced : more apology would be needful for the Author's censure of monastic subtlety, if the truth did not support the observations he finds it requisite to lay before the reader.

Long before the invasion of the Danes, when this island was yet in its rude and uncultivated state, the innocence and ignorance of the people, seem to have subjected them for the most part to the commands of the bards, and the chiefs or heads of their clans ; they seem to have lived in an implicit obedience to their control ; and though their possessions were secured by first occupancy and labour, yet this control was often exerted to supply the requisites of general or particular maintenance, ambition, caprice, or superior power ; and although their labour was small, yet they preferred the procuring sustenance by the pleasures of the chase, to the drudgery of cultivating the soil for the fruits of the earth. In process of time, as each clan, or family, increased in years and strength, emulation strove to possess the mastery, and thus various chiefs were set up in the room of general and familiar acquiescence under one father : intestine feuds, and bloodshed, the natural consequence, disrobed many of the inhabited parts of the island of their tranquillity ; and whether as arbiters, or as peace makers, or commanded, as they

they declared, by holy inspiration, the bards struck the lyre, and as often led on one clan to the slaughter of another, as they ever endeavoured to promote the blessings of peace; the wounds of one quarrel were seldom healed before new eruptions again broke out.

These holy visitants were generally busied in fanning the fatal flame; which, as it raged, dropped into their coffers, the small treasures of the people! In proportion, however, as more regularity and order gained ground throughout the country, and as the people saw and felt the superior advantages of uniting under the obedience of a popular government, we find in very ancient writers, that the bards lost great part of that superstitious influence which they had so artfully exerted; and though they secluded themselves in groves and caverns, which they hallowed with a mystical secrecy of religious, but artful, veneration, yet the people did not then continue so readily to acquiesce in their power over general affairs, but gave them supreme authority in all matters relative to sacred rites; and it is certain, that very large tributes were even then exacted from the people, and deposited in these pious retreats, as offerings, to insure eternal salvation, and a lasting fame.

But this barren and useless superstition at length fell into disrepute, and gave place to christianity. The priesthood, with uncommon and unexampled zeal, settled in various parts of the island, under every disadvantage, except those of a fertile soil, their own unrestrained resolution, and a careful choice of an advantageous ground; huts and hovels in some reclusive parts, were the only residence of themselves and their mysteries; they had acquired the habit and skill of industry and labour, through necessity and perhaps vicissitude, and they shared with each other the alternate duties of agriculture and prayer. The chiefs of clans, or families, or districts, resorted thither to pay their sacred homage; and if they left behind them any token of their zeal, they seldom departed without some useful instruction in religion or in life. As the christian faith began to spread itself throughout the island, the donations of the lords and great landholders became more numerous and more liberal, and their visits to these pious residences more frequent and more fruitful. Still however the revenues of the clergy were not very considerable; but King Ethelwulph, Anno 855, made them a grant of the tithe of all his dominions, which increased them to that degree, that it gave cause to some of his successors, to lament in vain the good monarch's

monarch's liberality. (Rapin has preserved a copy of this grant, and there is another in the *Monasticon*, p. 100.)

It would be of little service to the present design, to trace the progress of the revenues of the church, through these early periods of our history; the curious anecdote, which commences the following tract, and is handed to us from tolerable authority, may serve to retain some clear notions, to what a height they had attained about the time of the Norman conquest.

In the times of dark and ill-judging superstition, the austerity of self-devoted wretchedness often reduced human nature to its last verge of existence, or plunged it into horrors, from which the mild and persuasive exhortations of christianity, offered to lead the fanatic in vain! In the absence of that serenity of heart which true religion inspires, the forlorn and miserable forgot their own virtues, their domestic and public duties, their regard to society, and the tender calls of conjugal or filial affection; and rushing into an unbrotherly solitude, devoted their possessions to build altars, and burn incense to appease the vengeance, their imaginations alone had conceived to be hovering around them; while they incurred new sins by such an
external

external service, to that Being whose favour had been more acceptably, or successfully implored, by directing the same contrite zeal to the performance of the duties of the station in which he had been pleased to place them. If so much zeal ever really actuated any of the founders of monasteries, yet I am afraid superstition and some share of ostentation were not often silent in their persuasions to so eminent an exhibition of public regard! But here I had rather withdraw from the inquiry.

Henry VIII.

It is most reasonable to conclude, that the new and enlightened principles which every where burst forth at the reformation, were the source of that happy alteration in the minds of opulent and charitable persons which directed their liberality to the relief of the poor afflicted, when its channel was diverted from the support and contribution of papal craft, dissimulation, arrogance, and irreligion! However grievous the ravages of a regal tyrant might have been to some recluse and sincere orders of Monks, yet they swept away a multitude of inordinate vices, and cleansed and purified the land from the severer dangers of sedition, hypocrisy, and pride: the professed servants of pious delusion grew opulent on the ill-judged offerings of their trembling penitents; presumed to be masters of
their

their consciences, and then insultingly jested at the large tributes which they, by terrifying denunciations of future heavenly vengeance, filched from their alarmed imaginations. But, thanks be to God, the restraints which it was necessary for the legislature to impose on these devices, by the several statutes of *Mortmain*, at first proving ineffectual and inadequate to the cunning and artifice of monastic subtlety, at length rose into a total suppression of their societies and abrogating their delusions, laid the cornerstone of the modern receptacles of indigence and disease !

To this view of our history, the reader's attention is now solicited ; and his most favourable extenuation is anxiously implored throughout the progress of the following tract : the materials necessary to be collected, in order to inform or amuse, have been found to grow in a soil uncultivated and a way untrodden ; and the truth was no where to be discovered without hazarding the thorny and obscure path of superstition and error. In such a progress, few flowers are to be expected ; but the studious may be induced to search further into the labyrinth of this obscure part of our history, and it is hoped, that he will be afterwards amply repaid by the best legal expositions

sitions of the last of our statutes of *Mortmain*, that the books afford, or that the favour of some able friends could supply. Under these circumstances, I have ventured to presume that this work may be useful ; and with that hope and impression, I offer it to the judgment of the public, our highest and most impartial tribunal, rather trusting to its candour, than presuming to hope for its favour.

A. HIGHMORE, jun.

T H E
H I S T O R Y
O F
M O R T M A I N.

C H A P. I.

WILLIAM the Conqueror, demanding the cause why he himself conquered the realm by one battle, which the Danes could not effect by many? Frederick, the Abbot of St. Alban's, answered, that the reason was, because now the land, which was the maintenance of martial men, was converted and given to pious employments, and for the maintenance of holy votaries:—To which the Conqueror replied, that if the clergy be so strong, that the realm is enfeebled of men for the war, and subject thereby to foreign invasion, he would aid it: and therefore took away many of the revenues of this Abbot, and of others also.—I take this to be the origin of all the restraints in *Mortmain*. Speed. 418. b.

I shall endeavour to pursue the chain of statutes which the legislature has thought fit in various times to enact, relative to the needful restraints of gifts in *Mortmain*.

Alienation in *Mortmain*, in mortua manû, is an alienation of lands or tenements to any corporation, 2 Bl. Com. 263

B

sole

sole or aggregate, ecclesiastical or civil. But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of *Mortmain* to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of *Mortmain*.

Ibid. i. 479.

9 Hen. 3, c. 36
Fitz. Mortm.

1. 3.

Bro. Mortm. 36

2 Inst. 74.

Wood Inst. 301,
182.

By the 36th article of Magna Charta, it is ordered thus: "It shall not be lawful from henceforth, to any, "to give his lands to any religious house, and to take "the same land again to hold of the same house. Nor "shall it be lawful to any house of religion, to take the "lands of any and to release the same of him, to him to "whom he received it. If any from henceforth give "his lands, and thereupon be convict, the gift shall be "utterly void, and the land shall accrue to the lord of "the fee."

The cause for this article, was, to correct an evasion, ingeniously invented by the clergy, to get over the difficulty of their being obliged to procure from the crown a license to purchase in *Mortmain*; which seems to have been the practice among the Saxons above sixty years before the Norman conquest, and continues appended to the prerogative at this day; and also a like license to alienate, whenever there was a mesne or intermediate lord between the King and the alienor: thus, as the forfeiture accrued to the immediate lord, the possessor instantly aliened to the religious house, and then took the lands back again as tenant thereto, which kind of instantaneous seisin, was probably held not to occasion any forfeiture: and then by committing some other act of forfeiture, surrender or escheat, the monastery entered as immediate lord.

Seld. Jan. Angl.
l. 2, f. 45.

F. N. B. 121.

2 Bl. Com.
269.

About

About this period, we find the greatest part of Europe amused by those holy expeditions, called *Crusades*: Pomp and magnificence, a vast retinue, large bounties, and great expence, always accompanied this journey of imaginary salvation. The Princes of Christendom vied with each other in splendor and dazzling homage to the holy cross; the banners of each potentate blazed before the world, and deluded multitudes fell prostrate, with mistaken zeal, at the approach of these fanatic baubles, in preference to the pure simplicity of the true faith. The spiritual Babylon now reigned the idol of bigoted frenzy; and while the people vainly thought they sacrificed to Christ, they were literally bending the knee to Baal.

But the legal thread of our history carries us on to the reign of Edward the First, who ascended the throne with the strongest proofs of his desire to reform the abuses which had been introduced into the kingdom. The prodigious increase of the riches of the clergy, from the causes already mentioned, and of the monasteries also, had long been a subject of public complaint, and no one had been able to find out an effectual method to put a stop to an evil so prejudicial to commerce, and to the state. Although the Barons, who exacted from King John the great Charter, still so deservedly revered, had taken care to insert the clause already mentioned, forbidding alienations of lands to the church; yet this had not been regarded. Complaints were renewed on this head and many others, and kept pace with the hopes in which every one exulted, that all their grievances would now be redressed. It was demonstrated to the aspiring King, that the church never dying, always acquiring and never alienating, her riches must consequently increase, and

in process of time all the lands would be in possession of the clergy.

It should be supposed, that the principles alone of the great Charter of the Realm, would have held the people in awe, and have induced them to despise and reject all strict interpretation of the letter: but even this was not powerful enough to resist the ingenuity of these votaries to monastic subtlety—a situation wherein they knew themselves protected from danger, so long as they held the consciences of men, and from whence they could command obedience to their decrees, as lords over the vassals of their feudal seignories! As the above recited clause in Magna Charta had put an end to their concerted forfeitures, they had contrived leases for long terms (which first introduced those extensive terms for a thousand years or more, now so frequent in conveyances): the king maturely considered the grievance complained of, proposed a new law to his parliament, which they received with joy, and thus the legislature were induced to interpose by the statute *De Religiosis*, Anno 1279.

The statute recites, “That it had been of late provided, that religious men should not enter into the fees of any, without license or will of the chief lord of whom such fees be holden immediately; and notwithstanding, such religious men have entered as well into their own fees, as into the fees of other men, appropriating and buying them, and sometime receiving them of the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for the defence of the realm, are wrongfully withdrawn, and the chief lords to lose their escheats of the same. It is enacted in substance

² Bl. Com. 276

⁷ Edw. 1. st. 2.

¹ Roll. 154, 7.

² Roll. 170.

Bro. Mortm.

15-43.

⁵⁰ E. 3, c. 22.

¹³ Co. Lit. 26.

¹⁵ E. 4. c. 13.

Fitz. Forme-

don.

² Bulst. 187.

³ Bulst. 45.

“ substance as follows, That no person shall buy or
 “ sell, by color of gift, or lease, or otherwise, or receive
 “ by reason of any other title, any lands or tenements,
 “ or by any other craft will appropre to himself under
 “ pain of forfeiture of same, whereby said lands may
 “ come into *Mortmain*. The lord of the fee to enter
 “ such forfeiture within a year after such alienation,
 “ and hold the same as an inheritance. If he neglect
 “ to enter, then the next chief lord immediate to enter
 “ in six months then next, and so in succession. In
 “ default of their entry, the lands to fall to the crown,
 “ saving due services to the chief lord of the fee.”

As the pope and the clergy mutually supported each other, in endeavouring to establish a permanent supremacy in the papal throne; this act was one of the most effectual means to oppose them both, by withstanding the one, and checking the growth of the other; it was a fatal blow to the clergy, whose ambition urged them to grasp the universal dominion over public property; and it likewise proved as prejudicial to the Pope, since no bounds could be set to the power of the clergy, without lessening that of the court of Rome.

It should seem as if the last act would have prevented all new devices, but as it extended only to gifts and conveyances *between parties*, religious men now began to set up a fictitious title to the land, and by bringing an action against the tenant, who by collusion suffered a judgment by default, they entered, and so defeated the statute. [This is the origin of modern Recoveries, the great assurance of the kingdom.]

But to prevent so glaring an abuse of the legislative power, it was in such cases ordained by a subsequent statute, that a jury should try the right of the parties,

4 Rapin, 9.

2 Inst. 75.
 2 Bl. Com. 271
 2 Burn, Eccl.
 Law, 472.

13 Edw. 1. c.
 32.

2 Inst. 431.

HISTORY OF

and if it should be proved that the religious house had no right, then the lands should be subject to the above forfeiture : and the like provision was made to prevent the additional artifices of the tenants setting up crosses on their lands (the badges of knights templars, and hospitallers), in order to protect them from the feudal demands of their lords, by virtue of the privileges annexed to those religious and military orders.

18 Edw: 1. ft.
1. c. 3.
2 Inst. 501.

Cap. 3.

The statute of *Quia emptores* abolished all subinfeodations, and allowed men to alienate their lands to be holden of their next immediate lord ; and a proviso was inserted, to prevent any future evasions, that this should not extend to authorize any kind of alienation in *Mortmain*.

27 Edw. 1. ft. 2.

F. N. B. 223.

34 Edw. 1. ft. 3.

In a very few years after, the legislature was obliged again to interrupt the ingenuity of the sacred Conclave, and to revive the ancient authority of the crown, in granting license to amortize lands ; and an act was passed establishing a mode of application for such consent, by writ of *Ad quod damnum*, which lay from the Court of Chancery, to any one who required the King's license for such alienation ; which was directed to the Escheator, " to enquire what damage would ensue to " the king, or unto other persons, if the king should " grant such license ;" and upon the return, the king was to give leave to alien in *Mortmain* : but even this license was further restrained (as no doubt the process soon became a mere matter of form) by a new statute, enacting, " That even this license should be ineffectual " without the consent of the mesne or intermediate " lords."

It is certain, that when the people saw the legislature so attentive to repress the growing accumulations of the hierarchy, there might be grounds for designing men,

men, to disturb both them and their devotees in such possessions, which they could discover to have been obtained without all the forms which the foregoing restrictions required; it is not unlikely, these informations increased so fast as to alarm, and perhaps so successfully as to abridge the monasteries of some of their newly acquired temporalities; wherefore they seem to have procured an act which indemnified and released them on an impeachment, if they could produce the royal charter of license, the inquest on the writ of *Ad quod damnum*, or fine; and if they could not sufficiently shew that they entered by due process, after such license granted, then "that they should be well received to make convenient fine for the same."

18 Edw. 3. ft.
3. c. 3.

The next invention to elude all these restrictions was, to procure persons to take the lands in their own names, and then declare the same to be for the only use of certain monasteries, gilds, or fraternities; and also to purchase and dedicate large tracts of land adjoining to churches, as churchyards:—An act to subvert these pretended uses (which were the origin of the modern declarations of trust) was accordingly passed in the reign of Richard II. which amortized all such possessions, and rendered them forfeitable; and declared all cities, boroughs, towns, gilds, and fraternities, as being perpetual, under the same disabilities of *Mortmain*, as *religious houses*.

15 R. 2 c. 5.

It was the custom, at this period of our history, for the sheriffs of every county to hold congregational courts twice a year, for the decision of causes ecclesiastical, criminal, and civil: from what has already been related, it is easy to conceive to what encroachments episcopal authority had gradually aspired and arisen at that time; but it did not stop here; for in order to

4 Inst. c. 83,
p. 259.
Sharp's Account
of the ancient
Tithings. p. 69,
70.

2 Rich. 2.

attain a right of judging in all matters ecclesiastical, according to causes and decretals, *unknown to the people*, the clergy set up a fictitious charter, said to have been granted them by William the Conqueror, but never known till then, which was three hundred years after the demise of that prince, and which in the weak and confused reign of Richard II. they procured to be inrolled; thus assuming a self-erected power of sitting in the sheriff's courts; which devolved upon the bishop, but was afterwards relinquished.

The fifteenth century, (from Rich. I. to Hen. VII.) famous for the councils of Constance and Basil, was likewise famous for the deplorable state of the christian church.—The leading articles of the faith were no longer adhered to, and the far greater part of the people's religion was made to consist in pilgrimages, and the idol-worship of the Virgin Mary, saints, and relics. The example of the clergy excited no devotion, the church discipline was relaxed, and the purity of the gospel was forgotten or despised: temporal advantages were the whole pursuit of the teachers of the christian faith. England was in the same state with the rest of Europe. The people were extremely desirous of a reformation of divers abuses which had crept into the church; but the clergy opposed all attempts at a reform, because no change could be made but to their prejudice; and the kings made religion subservient to their interests. When they imagined they stood in need of the clergy, they found ways and means enough to evade the people's demands; but when the parliament's goodwill was requisite, they assented to such statutes as served to curb the incroachments of the pope and the clergy.

6 Rapin, 454,
479, 484.

Notwithstanding all the complaints which the English
had

had frequently carried to the court of Rome, about her continual encroachments, and notwithstanding the precautions which several parliaments had taken to screen themselves from her usurpations, the popes did not abate the least of their pretensions; upon every occasion that offered, they made no scruple to act contrary to the statutes of the English parliament, and to assert their apostolick power, without troubling themselves whether they prejudiced the king or his subjects. The parliament, willing to remedy these abuses, passed an act against purchasing dispensations from payment of tythe; and another against provisions of exemption from the jurisdiction of the bishops; but these were ineffectual; for the fulness of the apostolic power again exempted the monks from any observance of these statutes; and this roused the parliament, who added the penalties of the statute of *Præmunire* to their former acts.*

In 1523, Cardinal Wolsey, the favourite and minister of Henry VIII. had raised his power at court so high, that his influence carried him above all care or solicitude for the welfare of the people.—His arrogance surpassed the bounds of his own interest, and at length

* In the reign of Henry V. Anno 1404, and 1414, two unsuccessful attempts were made by the commons, to reduce the wealth of the clergy.—But the latter ended more effectually than the former, in a proposal of delivering up to the king, through zeal and affection (professed to be more sincere than that of the commons), the *alien priories*, which being one hundred and ten in number, were possessed of lands that would considerably increase the revenues of the crown. The king seems to have judged it most prudent to take what the clergy offered of their own accord, and therefore accepted the proposal, and the act passed without any opposition.

7 Rapin, 263,
277, 418.

Anno 1529.

produced his fall. To perpetuate his name, he formed a project, for which he afterwards procured the pope's bull, "to suppress as many monasteries as he pleased, to the amount of 3000 ducats a year," in order to transfer their revenues to two colleges he had intention to found, one at Oxford, and another at Ipswich, the place of his birth, in order to fit students for the former.—But although the Cardinal had exerted every power to establish these colleges, yet the king was deaf to all his entreaties for the preservation of them, and in the general confiscation which afterwards distinguished the mournful annals of the church, their endowments were vested in the hands of the crown, and the name of their founder sunk in obscurity.

The See of Rome had long been engaged in very serious contests with several of the states of Europe; the assumed supremacy she had constantly exerted over England, became insupportable. The writings of Martin Luther had been industriously and successfully circulated in every part of the island, and the people now began to entertain very different opinions of religion, to those of their ancestors, especially with regard to the papal authority. Pope Clement VII. did not take the means to preserve any conciliation, but persisting in his measures and also in his objection to the king's divorce from queen Catherine, the interest of the king and the people thus became the same. The Pope afterwards signified his desire of accommodation by dispensation, which the king resolved to reject; and this produced the first blow to the papal authority; a proclamation, forbidding, under severe penalties, the receiving any bull from Rome, contrary to the prerogatives of the crown. The consequent fall of Wolsey was grounded on his exercising his legatine authority, without

without the king's license; and of his disposing, as legate, of several benefices, contrary to the statutes of *Provisors* and *Præmunire*: the whole body of the clergy fell likewise under the same predicament, they were obliged to sue to the crown for a pardon, which was granted at the expence of 100,000*l*. The thunders of the Vatican were now heard with contempt, and the crown of England at length began to feel itself released from an unjust bondage, and subject to no other control than the laws of the realm.

The grant of lands to *superstitious uses*, such as for masses to be said for the soul of the donor, when he should quit the present stage of existence, and the like; was the most fertile invention to increase the power of the clergy (and a principal support of the arguments in favour of purgatory): The heads of the papal priesthood luxuriously slumbered upon large bequests for this purpose, while their inferior brethren spread their tattered garments over the graves of departed visionaries, and exhausted their breath in vain repetitions for the safety of those souls for whom they felt very little regard, and less piety!

The former statutes had as yet applied only to corporate bodies; it became now essential to preserve whole families from ruin, by forbidding such acts of selfish devotion; and with this prohibition, the glorious and heavenly Reformation first dawned upon England. Henry the Eighth, however tyrannical and self-willed in all his pursuits, and whatever sinister views might lead him in this great cause, yet seems to have been blessed with an inspired firmness, that bore him on amid all the crowd of public prejudice; the arts of papal priestcraft; the terrors, to him vain terrors, of the hierarchy; and the multitudes of his wondering people, then deeply shackled

shackled by the fetters of superstition, and the influence, almost unshaken, of the church of Rome! He thus began by attacking men in their private and internal principles, and the priesthood in this chief bond which preserved their power.

23 Hen. 8. c.
10. Anno 1531

The new act abolished these purgatorial services: it recites, "that by such sales and conveyances made
"of trust of lands to the use of churches, fraternities,
"or brotherhoods, erected and made of devotion, or by
"consent of the people without any corporation; or to
"the use and intent to have obits perpetual, or a con-
"tinual service of a priest forever, or for threescore or
"four score years (supposing, no doubt, that their
purgatorial state might by that time be concluded),
"out of the issues of land charged therewith, that as
"much loss and inconvenience happened, and the same
"were as prejudicial as where lands were aliened in
"*Mortmain*."

"Wherefore all such uses, by what name, nature,
"or quality they were called, were from thenceforth
"declared to be utterly void. But this is saved in
"some degree by a proviso, authorizing any person
"seized of lands to his own use, or having feoffees of
"any trust of lands to his use, to make or devise the
"same for the above purposes, so as the same do not
"continue for a longer term than twenty years.

"All devices and contrived assurances to defraud
"the statute, are declared void; and it is declared that
"the act shall always be interpreted and expounded as
"beneficially as may be to the destruction and utter
"avoiding of such uses; but not to prejudice the right
"or custom any corporation might then hold, to devise
"lands in *Mortmain*."

Superstitious uses, were the object which this statute

was

was designed to overthrow; but the same propensity remaining among the people, happily directed by a better judgment, they created trusts for the endowment of free-schools, seminaries of education, and stipendiary reliefs to the poor and aged; a practice which the law certainly favoured, had the design ever been put in practice, by adjudging it not within the restrictions of the last cited statute, which was expounded to be intended only to subvert the progress of superstition.

Cro. El. 288.
1 Co. 26.
Gibb. 645.

In 1532, these measures were further extended, by an act which established the supremacy of the three estates of the realm, in all causes spiritual as well as temporal; and decreed the penalties of Præmunire on all who should prefer appeals to the see of Rome, and appointed the judicature of the ecclesiastical court. 24 H. 8. c. 12. Rapin.
The pope's earnest remonstrances against the king's divorce, seem to have been one great cause of the general abolition of his authority in England; in the acts of exemption from the annates, appointing bishops, pence, procurations, delegations, expedition of bulls, and dispensations; the very name of the pope was, by proclamation in 1534, ordered to be struck out of all books, that the remembrance of it might, if possible, be lost for ever. In the mean while, as the people were daily corrupted by the monks, who insinuated that the king was going to overturn all religion; he resolved to take every possible precaution to prevent the pernicious designs of these dangerous adversaries. To that end, the suppression of all monasteries was suggested, which the king resolved to effect by degrees. He began by ordering visitations, whereby he should discover their revenues and practices. The monks, conscious of their irregularities, were easily terrified, by the threats of their visitors, into a surrender of their houses

houses to the hands of the king: the visitations unravelled to open day a series of debauchery, corruption, wickedness, and abominations (says Burnet) "equal to any that were in Sodom;" and the king gave them leave to quit their houses of mock sanctity. Henry tried his success with his nephew James king of Scotland, but found him still an adherent to the see of Rome. In 1535, he proceeded in his plan, by procuring an act to abolish all the lesser monasteries whose revenues did not amount to more than 200l. and this was followed by an order for publishing the holy scriptures in English. The Pope solicited a reconciliation, which was rejected, and followed by an act, incurring the penalties of Præmunire on all who endeavoured to restore his authority in England.

27 H. 8. c. 28.
28 H. 8. c. 16.

All these measures naturally produced innumerable discontents among the clergy, the monks, and the people.—An insurrection followed, which was happily suppressed; but it served only to facilitate the ruin of monastick pride; to which cause the king easily attributed the danger he had been exposed to, and therefore resolved upon the suppression of all the monasteries, and for that purpose appointed, as before, another strict visitation.

Anno 1537.

The gross and impious abuses there discovered, were immediately published by the king's command; the *forged relics*, and *secret springs* which moved images, said to be moved by the effect of a divine power, were broken down; the visionary relief attributed by every deluded votary who threw himself at their feet, began to be no longer felt; and the impositions and *pious frauds*, practised by the priests upon the credulity of the people, were universally exposed. The shrine of Becket shared the common fate. It is said, that in one year

the offerings upon the altar of Christ did not amount to one penny; those at the altar of the Virgin, to 4l. 1s. 8d. but those at the shrine of Becket, who was accounted the greatest saint in heaven, to 954l. 6s. 3d.

Whatever might have been the views of Henry, to whom avarice has been assigned, with apparent justice; and to whose ingenuity is also attributed a subtle report that an invasion was expected, or a continental war, formed by the pope, to involve him in new distractions, as well abroad as at home; it is certain, he made these the motives for suppressing religious houses, and appropriating some of their immense riches to the charges of the state, instead of raising a subsidy upon the people.

The act of 1539 granted the lands of religious houses to the king, which were supposed to have been voluntarily surrendered to him; an artifice which he adopted to blunt the edge of cruelty, which was imputed to him by the suppression; and indeed the extravagant devotion of this parliament, to the will of the monarch, particularly testified in the act for enlarging his royal prerogative, were additional distresses to the church of antichrist. But though the sums acquired by this suppression amounted to 1,600,000l. the king employed only 8000l. per annum in founding six new bishopricks, and establishing canons in some of the old cathedrals: the rest of the money was injudiciously lavished away.*

31 H. 8. c. 13.

* The king projected a noble design of a college, for the study of the affairs of government, the laws, history, &c. where all the duties of the statesman were to be the chief objects of pursuit: and Sir N. Bacon, Thomas Denton, and Robert Cary, actually drew up a full project of the nature and orders of such a house, which were presented to the king; but it does not appear why so excellent a plan became abortive. Burnet.

In

In 1540, the order of St. John of Jerusalem, since known by the name of the Knights of Malta, shared the fate of their brethren in the faith. Their obstinate dependence on the pope and the emperor, was the cause or pretence of their ruin. The parliament gave the king all their lands, out of which he allowed them 3000*l.* per annum, for their maintenance.

One can scarcely find greater signs of a slavish attachment to the prince's will, than seemed to pervade the parliament, and the people also at this period.—The pope's infallibility was transferred by an act of parliament to the crown, under a colourable limitation in favour of the laws of the realm: But several persons, who still avowed their adherence to the old religion, and denied the king's supremacy, suffered for their perseverance, at the stake.

In 1545, most part of the colleges, collegiate churches, and hospitals, surrendered to the king by acts and deeds, seemingly voluntary, but were no more so than those of the Abbots and Priors: which surrenders were afterwards confirmed by an act of parliament; but the two universities of Oxford and Cambridge claimed and received the king's protection, which was extended to a continuation of their ancient privileges.

1546.

To co-operate in the great work of the reformation, and to prepare the way for a perpetual establishment of the protestant cause, it became necessary for the legislature to give some material encouragement to the liberality of opulent men, who felt the desire of signifying their names, and shewing an example of benevolence, that might suppress the vigilance of avarice or selfish luxury: and for this good purpose, it was necessary to relax in some measure from the severity which the parliament had assumed in the restraints of

the *Mortmain* acts; and when, after the demise of Henry, they saw the new doctrines of the church sustained by the regency, during the minority of a prince of Idw. 6. exalted character, transcendent abilities, and acknowledged resolution to support the protestant faith; while the people were rapidly shaking off the yoke of religious slavery, under which they so long had groaned; the crown seems to have reassumed the power formerly given to its prerogative, of granting licences to alienate lands in *Mortmain*, and joined with the legislature in diverting their papal purposes, into those of protestant and charitable uses; and such wholesome establishments were deemed the most effectual instruments to perpetuate among the people, the doctrines and milder precepts of the reformed church.

18 Ed. 3. st.
3, c. iii.

But this was accompanied by an act, which totally 1 Ed. 6. c. xiv. overturned all the expiring hopes of papal influence. The chantries, or small chapels, generally to be seen in old cathedrals, round the body of the church, had been erected by licence from the crown, without the ordinary, who had no concern therein; sums of money being usually bequeathed for their needful repair, and for a stipend to a priest, for the superstitious purposes already mentioned, of constant masses for the soul of the donor deceased, obits, anniversaries, and the like: the present act seems to have resumed the subject where the former act of Henry VIII. had left it, and totally 28 H. 8. c. x. abolished, without exception, the whole of this remaining branch of crafty fanaticism; vested all lands and property wholly *devoted* for such purposes, in the crown; but such as were granted *only for a term of years*, were given again to the heir at law at the expiration thereof.

These chantry lands were sold to provide revenues Rapin. for six newly created lords of the regency, during the

young king's minority ; but the scheme of the reformation went on under their protectorship. The executors of the late king also wanted these lands, to pay his debts and legacies, while the nobility thirsted after them for their own emolument. The parliament of England kept pace with the emperor in carrying on the designs of the reformation : The acts of 1548, for the uniformity of the church liturgy, and the marriage of priests, sufficiently proved to the people, that the wishes of the late king were wholly complied with ; but the Princess Mary always took some occasion to signify her disapprobation of these measures, which she afterwards more openly avowed, by her cruelty and bigotry.

Throughout the reign of Edward the Sixth, we meet with acts, that were all built on the grand foundation of that of his predecessor, which dissolved the monasteries ; tending to the same grand point of effectually subverting the constitutions of the romish church ; the establishment of a revived book of common prayer, and the administration of the sacraments, which restored the truth, and abolished the empty credulity of a transubstantiated symbol ; the act for payment of tithes ; the permitting the marriage of priests ; the abolishing of mass books, and breaking down of images ; all followed each other in a regular train, and ruined for ever the expiring cause of artifice and idolatry.—But though the legislature has ever been careful to restrain monkish artifice, yet monasteries and *religious men*, as the term was, were always under its watchful protection ; but towards their dissolution, the parliament seems with unparalleled assiduity to have concerted and effected their destruction. And exclusive of the grasp of power and wealth, which at all times

distin-

and 3 Edw. 6
c. 1.
c. 21.

1 Edw. 6. c. 1.
2 and 3 Edw. 6.
c. 1.—5 and 6
Edw. 6. c. 1.
2 and 3 Edw. 6.
c. 13.

Ibid. c. 21.
5 and 6 Edw.
6. c. 12. 3 and
4 Edw. 6 c.
10.

9 H. 3. c. 5.
52 H. 3. c. 10.
and 28.

distinguished the leading character of Henry the Eighth, the extreme dissoluteness of manners of these *religious men*, who became at last unbounded in their excesses, called aloud for the interposition of a wise and virtuous Government. It appears that, so early as in the reign of Edward the First, it was customary for the monks to give great entertainments, even to the injury of the revenues of their house—that the abbots of St. Austin, St. Benedict, and other *sacred* orders, presiding over a number of smaller houses, had levied very exorbitant fines and tributes upon them, whereby “the service of God was diminished, and they were rendered unable to give alms to the poor, sick, and feeble; and the healths of the living, and souls of the dead were miserably defrauded, and hospitable alms-giving and other godly deeds had ceased.” These abuses were at first only restrained, but they furnished additional powerful arguments, for the future abolition of the whole seminaries, and all obedience to the see of Rome.

3 Edw. 1. c. 1.

35 Edw. 1. st. 1. c. 1.

Among the multitudes who had outwardly declared themselves protestants, there were abundance of persons who were so only in name; some halted still between the two religions, others were papists in their hearts; and very many having regard only to temporal advantages, had embraced the reformation merely to make their fortunes: the fewest in number were those who were truly convinced of the tenets of the new religion: all were united against the Duke of Northumberland, who succeeded the Earl of Hertford in the protectorship, and whose tyrannical government had already been felt too severely, and who was in all probability to have been the prime minister of Jane Queen of Scotland.—all this was most flattering to the hopes of Mary,

who promised to make no change in religion; and she was soon after proclaimed queen, amid the acclamations of the whole deluded nation.

But as soon as she ascended the throne, a new scene of affairs seems to have staggered the very promising hopes which had been raised from the preceding acts; her artful proclamation, the restoration of several bishops who had been deposed, the silence of the court at the performance of the romish formularies in many places, contrary to the late acts; and some injustices suffered to be committed against those who had favoured the reformation; gave new vigour to the papists, and struck an alarm throughout the realm, that divided the minds and the actions of men. She began her designs of restoring the papacy, by affecting to secure the abbey-lands to their possessors, and more especially by her marriage with Philip of Spain. In the 26th of Henry the Eighth, and several subsequent statutes, first-fruits and tenths were granted out of every benefice, towards the revenue of the crown; but Mary, at her accession, rescinded those acts and all augmentations:— And after the arrival of Cardinal Pole, the servants of the crown readily bent the knee to that holy missionary; and the parliament, by a solemn renunciation and repeal of all the former acts which had passed during the *time of the schism*, as they styled the reformation, allowed all persons to alienate their lands in *Mortmain* for *twenty years*; rigorously punished the visitors appointed by Henry the Eighth; restored to several of the monasteries much of their effects; repaired the old and built new ones; introduced again those destructive tenets which the wisdom of her late predecessors had endeavoured to eradicate; and stained the pure raiment of sincere and

1 and 2 P. and
M. c. 8.

Seft. 51.

Dyer, 255.
11 Co. 72.
Hob. 123.
1 Roll. 166,
418.

and truly christian fortitude, with the blood of its pious adherents !

The then parliament, as full of zeal for the crown, as the former had been for the reformed church, gave ample powers to the queen, and to the Legate *de latere*, to establish, *by all methods*, the primitive persuasions of her own dogmas ; what methods were accordingly taken, need not be repeated at this day of religious tranquillity, when feud and phrenzy are alike forgotten !*

But through the mercy of heaven, these calamities lasted not long ; and the present tranquillity we enjoy, may be said to have arisen, as well from the horrors with which every one was then affected by the excesses of papal persecution, as also from the persevering and steady measures of Elizabeth, the establisher of our faith, and the glory of England ! She began by restoring the ancient jurisdiction of the crown over the estate ecclesiastical and spiritual, and by abolishing all foreign power repugnant thereto ; and on this foundation, she built the structure under which the people now assemble to bend their hearts before God !

I Eliz. c. 1.

She was no sooner seated on the throne, than proposals of marriage were sent over to her from Philip king of Spain, who was desirous of preserving the title of king of England, and the Roman Catholic doctrines there ; she found herself in some difficulty to reject them, and at the same time to preserve the friendship of some of her allies ; and the readiest way that offered to prepare him

Anno 1558.

* The only act of clemency in that reign, was the suffering two refugees, Peter Martyr, and a popish professor, John à Lasco, with few other foreigners, to quit the kingdom. Mary carried her enormities so high, as to form a plan for the establishment of an inquisition in this country.—In the space of three years 800 martyrs suffered death in the cause of the protestant faith. Rapin.

for her refusal, was, by pushing on the design of changing the religion of England, well imagining that when once this should be effected, it would put an end to his importunity: she therefore renewed the disputations on certain articles of religion, restored the tenths and first-fruits to the crown, and also the unappropriated tithes. The parliament applied its attention to the affairs of religion, appointed the public worship in the vulgar tongue, restored to the crown its supremacy over the church in England, and renewed and confirmed the acts relative to religion, passed in the reign of Edward the Sixth: All religious houses founded by queen Mary were suppressed; Edward's deprivation of popish bishops was declared valid, and all leases made by their successors legal; together with an act for the uniformity of public prayer.

In 1559, the parliament seems to have put a final end to all the doubts which had hitherto prevailed, and, notwithstanding many subsequent plots of the Papists, firmly established the reformation on the basis which two centuries have continued to maintain and confirm.

The acts that signalize the reign of Elizabeth, for the establishment of houses for the poor and afflicted, must be deferred till we come to the subject of *Charitable Uses*, to which they more materially relate, though in some measure they tend to relax the restraints of the statutes of *Mortmain*.

Motives for the
Reformation.

IT may not be unreasonable, before I proceed further, to offer a few observations on the motive which

which seem to have actuated those princes, who were more immediately concerned in the devising and completing the great plan of reformation in England; but whatever motives they were, the benefits of the measure should be the daily subject of our gratitude; they were instruments in the hand of providence, watchful for the future welfare of this country. "Christianity" (says the Rev. Mr. Duncombe, in his preface to the select works of Julian) "is well avenged of its enemies by the "very absurdities which they prefer to its tenets." The pope attempted to lay violent hands not only on the property but the consciences of men; and the protestant faith is thus well avenged of its papal enemies, not only by their absurdities, but by their cruelties and artifices.

Throughout all the plans and schemes which brought about the reformation, it is clearly observable, that religion was not the only motive of that great design: Henry the Eighth had very pressing need of supplies to carry on his continental troubles, in which the pope took an active part against him; the people were not then in such a state as they are at present, capable of bearing the weight of such a levy as the charges of a great campaign require, and still of supporting the current exigencies of their domestic supplies:—his caprice, his overbearing and tyrannical disposition, and the difficulties he felt in submitting to the power of the clergy, whose wealth had raised them above subordination to the crown, and various other causes in the confirming and annulling his frequent marriages, and in the disappointment he felt at not being able to extend his dominion in Europe, were all certain motives to induce him to listen to the suggestions of a part of his

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ministers,

ministers ; some of whom from more conscientious and pious motives, were, like Cranmer, impressed with a laudable desire of freeing their country from papal arrogance; and of establishing an honest devotion, and tenets less artful and obscure, and more consistent with the spirit of the gospel. That Cranmer was an honest man, and free from any sinister views of self-aggrandizement, all writers agree, and his conduct and his martyrdom eminently testify. Other statesmen might have been led by the sole principles of state policy, and the increase of the public finances : they were useful to the king, who while he openly applauded the former, discovered and cherished in his heart, the views and designs of the latter : and he easily found favour among his people for this grand undertaking, the chief honour of which was attributed to him, since they had long felt the increase of papal oppression, and at the same time saw no other channel of supplying the clergy and the king's needful demands, without the ruin of themselves,

It was natural for Henry, who saw the success of his measures beyond his warmest expectations, to provide for a continuation and completion of his design after his demise. He must have reflected with concern on the minority of his son, and his natural jealousy must have added disquietude to his fears of proper guardians for the infant crown. His judgment directed him to such men as had shewn the most interest in conducting his measures on the joint principles of religion and policy ; and under their perseverance, he at length contented himself in imagining that his son would one day command all the rich treasures and extensive land-property of the clergy. To acquire their possessions,
was

was at once to raise the power of the crown above all further dependence on that ambitious brotherhood; and to these deep laid schemes, the young king succeeded under the protectorship of the Earl of Hertford, and five other noblemen, assisted by a select council, who devoted themselves to the vigorous execution of all the wishes and desires of their late master. Edward the Sixth, though a young man of uncommon talents, yet cannot be supposed to have entered so deeply into these measures; but he understood them so far as to conceive their utility, and to express, at his early and lamented death, a concern for their future success.

It is impossible to peruse the annals of the next reign without shuddering at its horrors, and trembling for the fate of religion!—But it is the benign principle of truth, that no power can destroy her, though it may extend to stifle her voice for a short time! Mary from her earliest days had been surrounded by papists; and this seems extraordinary, that her father should have been so unmindful of her education in this particular, unless it might arise from his hopes of his son, whose youth might flatter him with length of days, and whose person and abilities might lead him into a marriage with some princess of the same persuasion in which he had been carefully educated. Mary often dissembled while in her father's court, by appearing publicly at the reformed church, but in her private chamber always thought proper to be absolved from such an offence, by receiving high mass from the ministration of persons who watched with jealous fears the vigorous exertions of her father, and her brother's council. When she ascended the throne, her dissimulation artfully shone forth

forth in a proclamation that she would not change the reformed religion ; but as she listened to the proposals of Philip of Spain, while her heart was beating with the exulting hopes of increasing grandeur, she gloried in the prospect of thus gaining a powerful ally, and joining the interest of the court of Rome, by restoring to the ruined monasteries, the riches which her father had gathered from them, and by bringing back her wandered flock to the foot of the sacred cross.

Elizabeth, besides the zeal which she always testified, during a long and successful and benevolent reign, for the reformed church, had still other views for regaining to the crown the affection of that part of her subjects, whose exertions in the same good cause had been stifled during the cruel reign of her sister Mary ; the most persecuting bigot that ever disgraced the annals of political history, or the delicacy of the female character. Elizabeth had a glorious ambition to see her country raised above the assumed and arrogant splendour of her enemies, whose chief power was open to her penetration, which readily exposed and chastised their vain glory. This laudable ambition was not a little augmented by the proposal of marriage from Philip of Spain, the husband of the late queen her sister, which she rejected : nor was it in any degree abated even by the more tender qualifications of unassuming modesty and a charitable piety, that regarded the future, as well as the present benefits of her people. If she saw the ill effects of Mary's cruelty, and beheld the odium that spread through all ranks from so flagrant and deserved a cause, she is to be applauded for taking example therefrom, and shunning the evil : when the source is clear,
it

it is commendable to cleanse the channel. If policy be attributed to Elizabeth, it must be allowed, that her amiable disposition contributed to set before her the enormities of Mary as unprincipled and indefensible. The spirit of the people roused by these crimes, and justly promising themselves better prospects, might have alarmed the queen ; but the purposes of her reformation, even at that period, tended more to their good than to the benefit of the crown.—The treasures of religious houses had long ago been lavished away, all sinister advantages were then expired, and the great and lasting proofs of her benevolence, which followed the restoration of the new church, are at this day convincing proofs, that whatever motives actuated her predecessors, those of public good directed and prospered the measures of Elizabeth, whom a benign providence, ever watchful over this country, chose to distinguish with exalted wisdom, in order to complete, under such a monarch, the glorious design of the safety of her people !

I hope to be excused for this digression.—I now proceed.

Special acts have sometimes exempted particular institutions from the above restraints ; as, the act of incorporation of commissioners for the Bedford Level ; the act for the uniting of churches, in cities and towns corporate, which empowers the owners of impropriations or tithes, to bestow the same thereon, and benefices under 100l. per annum, to be augmented by purchase of lands without license

15 Car. 2. c.
17.

17 Car. 2. c. 3.
s. 7.

22 Car. 2. c. 6.

2 and 3 Ann.
c. 11.

2 Burn Eccl.
Law, 474.

1 W. 3. sess. 2.
c. 2.

2 Haw. 391.

license of *Mortmain*; the act for advancing the sale of fee-farm and other rents, which allows all bodies corporate to purchase them without license of *Mortmain*; and we find the same favour granted to the governors of queen Anne's bounty, &c.

Many of the kings of England have claimed a power of dispensing with statutes; which power was carried to such a height in the reign of James the Second, and found to be of such dangerous consequence, as to make the execution of the most necessary laws in effect precarious, and merely dependent on the pleasure of the prince; and it seeming highly incongruous, that the king should have a kind of absolute unlimited power of dispensing with laws, wherein the church and state have the highest interest, when at the same time he has no power to dispense with any law which vests the least right or interest in a private subject; it was found by experience, necessary to enact, that no dispensation by *Non Obstante*, to any statute shall be allowed; but that the same shall be void and of none effect, except a dispensation be allowed in such statute.*

But for the promotion of religion and learning, it was afterwards felt most expedient to renew the encouragement to found seminaries, which the late disputes and

* Charles the First resolved to set about a recovery of the tithes and churchlands, which had been alienated in former reigns; several of them were purchased at low rates, and then with a shew of zeal surrendered to the crown. He purchased some estates of small value, and added them to several bishopricks; and all those who sought for favour at court, offered their churchlands to sale at a low price. 1 Burnet, O. T.

the

the restraints of *Mortmain*, continued to repress; wherefore in the next statute on this subject, we find it recited, 7 and 8 W. 3.
c. 37.

“that it would be a great hindrance to learning and
 “other good and charitable works, if persons well
 “inclined might not be permitted to found colleges or
 “schools for encouragement of learning, or to augment
 “the revenues of those already founded, by granting
 “lands thereto, or by granting lands to other bodies
 “politic or incorporated, then in being, or thenafter to
 “be incorporated, for other and public uses: It is
 “enacted, that it shall be lawful for the crown, as often
 “as it shall think fit, to grant to any persons, bodies
 “politic or corporate, license to alien in *Mortmain*,
 “and also to purchase and hold in *Mortmain*, in per-
 “petuity, or otherwise, any lands of whomsoever the
 “same shall be holden, which shall not be subject to
 “forfeiture by reason of such alienation or acquisition.”

Under this act the whole subject of *Mortmain* seems to have been held for almost half a century. However slack we may conjecture the inclination of men for charitable alienations to have been, at the making of the above act, we cannot but conclude that it had increased considerably, or that some very important and flagrant instances of family injustice, must have prevailed, to produce the following act of the late king.

It recites, “that gifts or alienations of lands, &c. 9 Geo. 2. c. 36.
 “in *Mortmain*, are prohibited or restrained by Magna
 “Charta, and divers other wholesome laws as prejudicial
 “to and against the common utility; nevertheless this
 “public mischief hath of late greatly increased by many
 “large and improvident alienations and dispositions
 “made

9 Geo. 2. c. 36.

“made by languishing and dying persons, or by other
 “persons, to uses called charitable uses; to take place
 “after their deaths, to the disherison of their lawful
 “heirs.” It is enacted, “that no lands, or tenements,
 “or money, stocks, or personal estate to be laid out or
 “disposed of in the purchase of lands or tenements,
 “shall be given or granted to any persons or bodies
 “corporate, for any charitable uses, under the restric-
 “tions therein mentioned.” The act is recited at
 length in its proper place (in the next chapter), to
 which it may be sufficient for the present to refer.

Having now traced the history of *Mortmain* from
 Magna Charta, down to the last act, which seems to
 have settled every difficulty, thoroughly effected the
 abolition of papal authority and influence, and restrained
 unwise and fanatical grants of land-property within very
 narrow limits—I shall proceed to the next and chief
 design of this tract, where the best expositions of this
 last statute that can be obtained, will be laid before the
 reader.

OF
CHARITABLE INSTITUTIONS,
AND
DEVICES OR BEQUESTS
FOR THEIR BENEFIT.

CHAP. II.

IN former ages of this country, the people seem to have deemed it necessary for any public benevolent purposes, not only to associate themselves into a company, but to sue to the crown for an act of incorporation; and thus we read of no projects for the benefit of the poor, but such as had opulence and endowment sufficient to erect houses, and form regular societies, vested, by charter, with all the powers and hopes of perpetuity. In modern times, we see the benevolence and assiduous exertion of a Howard,* a Hanway,† a

* Mr. Howard's pursuit is, that of relieving prisons in almost every state in Europe, from abuses of needless oppression, filthiness, and pestilence, in which he has hazarded his life.

† Mr. Hanway, with Mr. John Thornton, and Mr. Hicks of Hambro', founders of the Marine Society; a society which has been espoused from the mechanic in London, up to the crown, the parliament, the chiefs of India, &c.

Thornton,

Thornton,* and many others, filling the land with new and lasting examples ; some of them in almost every good work that can be devised ; and others confining their attention to their own favourite institutions ; but all uniting with one heart and liberal hand, in the most effectual means to plant safety in, and drive oppression even from the loathsome dungeon ; to provide for and reclaim the naked and the dissolute ; to promote, by a bountiful hand, these deeds of charity and peace ; or to preserve the poor and helpless from the malignant ravages of loathsome and fatal disease : The restraints of *Mortmain* were no bar to their designs, which they saw could be effected within the limits of a mutual agreement and hearty principles, which needed no other aid than that of voluntary contribution to preserve.

The former practice of obtaining charters, must appear clearly to the reader, from what has been already related on the subject of *Mortmain*, to have been pursued as an effectual means of preserving the influence of the Romish faith, by increase of opulence, the possession of lands, and a perpetuity of members of the same persuasion. But such were *ecclesiastical* corporations, being composed of spiritual members. *Lay* corporations are *civil* and *eleemosynary* ; the former for a variety of temporal purposes incident to the government ; the latter for the distribution of alms and benevolence.—To the latter we shall at present confine our inquiries.

As the former, or *civil corporation*, is for public government, it is therefore subject to the common law ; but

* Mr. Thornton's name and family are to be found in every list and contribution for private and public distresses.

as the latter, or *eleemosynary* corporation, is the creature of its founder, so it is internally governed by its private laws : not that the members of it are exempted from the common law by thus uniting, but the body in general is so ; except when they do any act repugnant to the law of the land : The breach of their private laws or orders, is no crime cognizable by the common law, unless any such act be extendible into a public wrong. If a general court, for instance, depose an officer, they exert only the power vested in them by their private rules ; but if they depose wrongfully, the common law will relieve him, because they have then extended the private powers of the institution too far. Nothing can more clearly shew an example of this matter, than the courts at Westminster constantly refusing to hear all matters of custom within any town corporate, where that custom has not been exceeded ; such as claims by customary attachment, the penalties for want of freedoms, and such like : thus the same court would never hear any complaint of matters within the scope of the rules of any charity : And though the king himself be a founder, yet the breach of these statutes are not crimes against the crown ; his power of pardoning is vested in him, as having the executive power ; the crimes he pardons are such as are against the public laws and statutes of the realm ; whereas these are in the nature of domestic rules, for the better ordering of private families.

1 Burn Eccl. Law, 419.

Stra. 912.

Formerly there were some hospitals that were *corporations aggregate*, as of master, wardens, and their brethren, as the companies of London are at this day ; others, where the master or warden had only the estate of

1 Inst. 242

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inheritance in him, and the brethren or sisters had merely a power to consent to his acts, having college or common seal. (Some of these latter had no seal.) Some of these institutions were eligible, or elective; some donative, and some presentable.

13 Edw. 1. ft. 1.
c. 41.
Cro. Car. 248;
281.
Lane, 113. 115.
Dyer, 81, 267,
287. 313.
2 Co. 49.
1 Roll. 202,
357, 152, 417.
2 Roll. 206, 160.
4 Co. 104.
1 Co. 47. Cro. El.
799, 449.
Moor, 263, 413,
693, 865.
Pl. 960, 129.
3 Leon. 114.
Cro. Ja. 51.
Hob. 123.
Goldf. 93.
1 Bulst. 120.
37 H. 8. c. 4.
1 Edw. 6. c. 14.
3 Bulst. 151.
1 Leon. 158.
Plowd. 177.
Hetley, 28, 41.

21 Hen. 8. c.
13.

After the incorporation of divers chapels, colleges, seminaries, religious houses, hospitals, and the like, the donors or pretended donors and founders, through avarice and of their own will, entered into the lands and houses thereof, and expelled the priests and officers, and took upon themselves the receipt of the rents and profits, and appropriated them to their own use; and some of the officers and governors by collusion sold the lands belonging thereto, and made leases for lives or years of the whole foundations, without reserving the usual rent; and others suffered recoveries of their possessions so gained, whereby the institutions became dissolved by patrons, or pretended patrons by their own authority; wherefore they were all vested by statute in the crown, together with all lands granted for finding a priest for ever; or if for a term, then during that term. But though the crown thus took into its own hands the supervision and control of these houses, yet this in no wise tended to abolish the power they had gained in the former reign; a reign generally marked with regal jealousy at the power of the clergy, whom the act restrained from taking any lands to farm, and from buying and selling any merchandize, except such as belonged to their spiritual person or glebe; and all spiritual persons of any religious house, having lands, or other yearly profits in right thereof, of the yearly value of 800 marks, might occupy the same to the advantage and maintenance of their house

house only, and not having sufficient, might take in farm other lands, and buy and sell corn and cattle, for the only manurage, tillage, and pasturage, of such farms, so that the profit should be appropriated to the house alone.

Note, that it is omitted to take notice of 23. H. 8. c. 10. Agt. superstitious uses.

After the reformation, when seminaries for education, and hospitals, began to be founded; Queen Elizabeth, in the act she procured for restitution of first-fruits to the crown, by a special proviso, shews her regard to religion and humanity; whereby it is declared that "nothing in the act shall extend to charge any hospital, founded and used, and the possessions thereof employed to the relief of poor people, or any school, or the possessions thereof, with the payment of any tenths or first-fruits."

1 Eliz. c. 4.
f. 40.

In the emergency which frequently brings even the best of men to a serious but hasty recollection, as to a proper disposition of their effects; it is often that they are not readily furnished with the correct title of the hospital, or institution, to whose charitable designs they would wish to contribute, out of the surplus of their fortunes; it may be feared that an apprehension might then arise, lest, by an error of so simple a kind, the testator's intentions might be defeated; wherefore, to obviate such a difficulty, we find an act which appears evidently made for the benefit of Christ's Hospital, St. Thomas's, and St. Bartholomew's, but it includes also all other hospitals; declaring "that all gifts, legacies by will, feoffment, or otherwise, for relief of the poor in any hospital, then remaining and being *in esse*, shall be as valid, according to the true meaning of the donor, as if the

14 Eliz. c. 14.

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13 Eliz. c. 10. "said corporation had been therein rightly named;
 "saying to all other persons what right they might
 "have in the lands, &c. given." The same act then
 recites one preceding, and explains, that the words
 "master or guardian, of any hospital," mentioned there-
 "in, were intended and meant of all hospitals, maison-
 "dieus, bead houses, and other houses, ordained for the
 "sustentation or relief of the poor, and shall be so
 "expounded and taken for ever."

5 Co. 14. b.
 11 Co. 76. a
 Palm. 216.

It has been since decided, that the act of the 13th Eliz.
 c. 10. to which this refers, extends to all manner of
 hospitals, whether incorporated by name of master, or
 warden, or by any other name, or whether a sole corpo-
 ration, or an aggregate of many; for this act has
 always had a benign and favourable construction, to
 prevent all inventions and evasions against its true
 intent; therefore it may be presumed, that the same
 construction may be extended to that statute, which
 refers to and confirms it; though in its strict applica-
 tion it is certainly confined to hospitals incorporated,
 and in being at that time.

31 Eliz. c. 6.

As the intention of every founder of a college, hall,
 school, or hospital, is, that all elections, presentations,
 or nominations to any of the offices therein, should be
 free from all corruption, or reward; we are led on in
 our researches, to an act which declares "that if any
 "person or persons, bodies politic or corporate, having
 "a voice therein, shall directly or indirectly take or
 "receive any fee or reward, or any security, or promise
 "of reward for his voice, or assent in any election, that
 "then the office which such person so offending shall
 "hold

“hold therein, shall become vacant, and the crown, or
 “to whomsoever else the presentation shall belong, shall
 “present a successor, as if he were naturally dead : and
 “if any officer shall take money, or security for
 “money, to resign in favour of another, he shall forfeit
 “double the sum, to be sued for by action of debt, half
 “to the house, and half to the person suing ; and not-
 “withstanding the sum paid by such person so contract-
 “ing, a new election of another shall be had, and he
 “shall be incapable of holding that place for that turn.”

This act points evidently at the colleges ; and though
 their peculiar statutes, and the acts confirming them, set
 them out of the plan and design of this tract, yet as the
 words *schools* and *hospitals* are inserted in it, and as the
 spirit of the act may stand as a direction in all elections
 at the present day, whether to incorporated, or to
 voluntary institutions, I have thought proper to intro-
 duce it ; and I hope it will be deemed no presumption
 to add, that while the act prohibits private persons of a
 corporation from taking bribes for their votes, it like-
 wise says “ that if any person or persons, bodies politic Sect. 2.
 “or corporate,” receive such bribes, &c. The strict
 culpability of the institution receiving a consideration
 for their aggregate voice, is certainly evaded by the
 modern practice of making governors previous to the
 day of election ; though it may reasonably be asked,
 whether, when a candidate or his friend lays down upon
 the board, a considerable sum, and produces as many
 proxies, or as many persons as the money amounts to,
 who have merely lent their names for the purpose
 without understanding how grossly they are defrauding
 justice and equity, and the candid and free choice of
 D 3 merit ;

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merit; whether by thus conniving at the worst corruption that ever crept in among a people, that of scoffing in the face of charity, and securing an election, not by the merit of the party, but by the length of his purse, they are not guilty of an offence against public honour, private conscience, and the spirit of the above-mentioned act?

Eliz. c. 5.

35 Eliz. c. 7.
f. 27.

But I hasten to the statute expressly made for erecting hospitals, or abiding and work-houses for the poor. It recites a clause in a former act, whereby it was allowed to give, or bequeath lands in fee simple, to the use of the poor, for provision, sustentation, or maintenance of any house of correction, or abiding houses, or of any stocks, or stores, &c. but as this power was ineffectual, because no person could erect such houses without license under the great seal, “her majesty graciously
“affecting the success of such good and charitable
“works, and that without often suit unto her, and with
“as great ease and little charge as might be, was of her
“princely care and blessed disposition, for the relief and
“comfort of maimed soldiers, mariners, and other poor
“and impotent people, pleased and contented that it
“should be enacted, That any person seized of any estate
“in fee simple, at their pleasure should have full power
“within twenty years then next, by deed inrolled in
“Chancery, to erect, found, and establish one or more
“hospitals, maison-dieus, abiding places, or houses of
“correction, at their will and pleasure, as well for the
“finding sustentation and relief of the maimed poor,
“needy, or impotent, as to set the poor to work, to
“have continuance for ever; and from time to time, to
“place such head and members, and such number of
“poor

“poor therein, as to him, and his heirs and assigns,
 “shall seem convenient. That such house shall be
 “incorporated, and have perpetual successions for ever,
 “in fact, deed, and name, and of such head, members,
 “and number of poor, as shall be appointed, or named
 “by the founder, by such deed inrolled; and shall be a
 “body politic and corporate, and by such name of incor-
 “poration, shall purchase, take, hold, and receive goods
 “or lands being freehold, so that the same exceed not the
 “yearly sum of 200l. above all charges or reprises to
 “any such house, and so as the same be not holden of
 “the crown, or other person by knights service, with-
 “out license, writ of *Ad quod damnum*, the statute of
 “*Mortmain*, or any other statute notwithstanding; and
 “may sue and be sued, have a common seal, be visited
 “and directed by such persons, and have such statutes,
 “and its officers be appointed and elected as the founder
 “shall direct.”

“All leases, grants, conveyances, or estates made there- Sect. 2.
 by, exceeding the number of one and twenty years, and
 that in possession, and whereupon the accustomable
 yearly rent or more, by the greater part of twenty years
 next before the making of such lease shall not be re-
 served and yearly payable, shall be void: saving to all
 persons (other than the founders) such right, services,
 and interest in the lands so given as they had before.

“Persons within age, women covert without their Sect. 3.
 husbands, and of not *sanæ memoriæ*, are excluded from
 making or endowing such corporations. And no such
 house shall be so erected, founded, or incorporated,
 unless it be endowed for ever with lands of the clear
 D 4 yearly

yearly value of 10l. per annum ; Provided, that no such incorporation shall do any act, whereby its lands, or goods, or any interest, or property therein, shall be vested or transferred in or to any other whatsoever, contrary to the meaning of the act, the construction of which shall be most beneficial and available, for the maintenance of the poor, and for repressing and avoiding all acts and devices to be invented, or put in ure, contrary to its true meaning." Made perpetual by 21 Jac. I. c. i.

39 Eliz. c. 6.

There was another act which immediately followed, for awarding commissioners to inquire of lands or goods given to hospitals, or other charitable uses misemployed, and to reform them : But this was repealed in about four years, as shall be noticed hereafter.

2 Inst. 712.
Duke 68-9. 71.
3 Co. 130.

The above act produced a very strange dispute among the learned and artful ; namely, as the endowment was extended to two hundred pounds annual income, what should be done with the overplus, if the lands or revenues should chance to produce more ? But after a variety of very solemn arguments, on a point of law so *abstruse*, it was decided that the sum of 200l. was a restraint upon the founder, but did not prevent, or mean that the hospital should not enjoy the increase thereof ; when once it became possessed and endowed, all subsequent profits followed of course.

The reason for the legislature promoting such incorporations, was obvious ; they desired to see public charity, and the protestant interest, well rooted among the people ; if land was granted for the purposes of charity,
or

or religion, or learning, to twenty individuals not incorporated, there could be no other legal way of continuing the property to any other persons for the same purposes, than by endless conveyances from one to another, as often as the hands changed: this is the case at present with all our institutions that are not incorporated; their possessions are held by trustees, and when these are reduced to three, their number should be filled up (a power which the Commissioners had by 43 Eliz. c. 4.); but if this be neglected, that would not extinguish or determine their right; for if it survive to one trustee, he would have a better right than any one else could pretend to, and might well convey over to other trustees; and indeed this is his duty, to which the court, on his refusal, would compel him.

1 Blac. Com. 468.

Duke, 63. 67.

2 Vern. 749.

The best mode that appears to me, and which I adopted under a very eminent opinion, when the trustees of lands were reduced to three in number; was, by lease and release, in which the remaining trustees conveyed to themselves and three new trustees, to the use of themselves and the new trustees and their heirs jointly, to and for the only use, and in trust for the charity; * thus no separate declaration of trust was necessary: by which method the former trustees were not excluded from the trust; for it is a credit to every institution, that the elders of it, who have exerted and contributed liberally to its early promotion, should remain upon its writings as the trustees of its wealth.

But when individuals are consolidated and united into a corporation, they and their successors are then considered as one person in law; as one person they have one will,

1 Blac. Com. 468.

* This practice generally prevails at this day, notwithstanding the act of 15 R. II. c. 5.

which

which is collected from the majority ; this one will, may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic ; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws : the privileges and immunities, the estates and possessions of the corporation, when once vested in them, will be for ever vested, without any new conveyance to new successions ; for all the individual members that have existed from the foundation to the present year, or that shall ever hereafter exist, are but one person in law, a person that never dies. In like manner, says Mr Justice Blackstone, as the river Thames is still the same river, though the parts which compose it are changing every instant, such are corporations aggregate : and though these privileges belong as well to *lay* as to *eleemosynary* societies, yet it is for our present purpose to apply them only to the latter, which are always under the protection of the Crown ; (though the King may perhaps have no presidency in the establishment ;) for as *parens patriæ* he has the general superintendance of all charities, wherefore it is always considered, that it is he who erects, the Subject is only instrumental ; and thus his Attorney General is the guardian of their rights, and the relator of their claims, as well as their grievances, before the Court of Chancery. But in addition to every rule that can be laid down for the government of charitable foundations, there is one that applies to them all, whether supported by charter or by statute, by endowment, or by continual contribution ; namely, a strict and conscientious adherence to the true end and design of the founders or the contributors ; and it should be remembered, that in private,
as

as well as public life, punctuality and justice are a continual shield of defence.

By a subsequent statute for relief of the poor, churchwardens are impowered, by leave of the lord of any manor, whereof any waste or common in their parish shall be parcel, and on previous agreement with him in writing, or otherwise according to any order of the justices at a quarter sessions, by like leave of the said lord, to erect, build, and set up in fit and convenient places of habitation, in such waste or common, at the several charges of the parish, or otherwise of the hundred or county, to be taxed as therein expressed, convenient houses of dwelling for the impotent poor, and to place inmates, or more families than one, in one cottage or house, and the same to be solely appropriated to that purpose, notwithstanding the statute of 31 Eliz. c. 7. [Continued by Car. I. c. 4. and further by 16 Car. I. c. 4.

43 Eliz. c. 2.
f. 5.

In the same year, the act to redress the misemployment of lands and effects given to charitable uses, was also made, vesting a general power in certain commissioners to inquire into all such abuses, and make decree therein.

43 Eliz. c. 4.

The act recites, "that lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money, and stocks of money, had been given, limited, appointed, and assigned, as well by the Queen, as by sundry other well-disposed persons; some for relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways; some for education and preferment of orphans;

43 Eliz. c. 4.

some for relief, stock, and maintenance of houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payment of fifteens, setting out of soldiers, and other taxes; which lands and effects had nevertheless not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust and negligence in those that should pay, deliver, and employ the same; for redress and remedy whereof, the act proceeds to appoint the Lord Chancellor, or Keeper of the Great Seal, and Chancellor of the dutchy of Lancaster, for the time being, from time to time, to award commissions under the great seal, or seal of the county palatine, as the case shall require, to the bishop of any diocese and his chancellor, and other persons of good and sound behaviour, authorizing them, or any four or more of them, with the assistance of a jury, to inquire of all such gifts and abuses, breaches of trusts, and misemployments, not employing, concealing, defrauding, misconverting or misgovernment of any lands, rents, effects, stocks, &c. given or thereafter to be given, limited, appointed, or assigned for any of the charitable or godly purposes before rehearsed; and their decree to be reverfible only in chancery or the dutchy court."

43 Eliz. c. 4.

Sect. 2.

The act was declared not to extend to any gifts to the Universities, or to Winchester, Westminster, or Eaton colleges, or any cathedral or collegiate church, or to any city or town corporate, where there is a special governor or governors appointed to govern or direct such lands or

Sect. 3.

or things disposed to any of the uses aforesaid, nor to any college, hospital, or free-school, which have special visitors or governors, or overseers appointed by their founders; or to prejudice the jurisdiction of the ordinary: and that no person having any interest in the places or goods in question, should be a commissioner or juror to inquire thereof.

43 Eliz. c. 4.
s. 4.

Sect. 5.

That no person having purchased such lands or effects for a valuable consideration, without fraud or covin, having no notice of their being given for a charitable use, shall be impeached by any decree concerning his estate therein; but recompense shall be ordered against such as being put in trust, or having notice of the charitable use, shall break the trust, defraud the same uses by any gift, conveyance, or conversion, &c. and against his heirs, executors, or administrators, as far as they have assets. Lands conveyed, or fallen to the Crown by statute, surrender, exchange, relinquishment, escheat, attainder, conveyance, or otherwise, if they had been granted to any of the aforesaid charitable uses at any time since her Majesty's reign, were adjudged liable to examination.

Sect. 6.

Sect. 7.

The Commissioners to certify their decrees into Chancery or the Dutchy Court, which shall make order for the execution thereof, whereto also all appeals lie thereon, and from thence to the House of Lords; and costs to be awarded at discretion against such as complain without just cause.

Sect. 8.

Sect. 9.

Cro. Car. 29.

Duke, 62.

Although the substance of this act would naturally lead us into the subject of visitation for redress of abuses, yet lest that matter should break the thread of our researches,

*See post.
7A.*

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researches, I shall beg leave to refer it to a subsequent chapter alone, and shall endeavour here to consider what other general matters arise from this act, affecting charitable uses and institutions.

The preamble sufficiently shews, how the humane disposition of this people had extended and branched itself forth into so numerous a class of public charities.

1 Burn Eccl.
Law, 285.
Duke Cha. Us.
32.

Duke 65.

43 Eliz. c. 4.

2 Vern. 387.

Vin. Tit. Cha.
Uses.

Duke, 84. 85.

77. 115.

Moor, 888. 890.

Duke 67.

Money was given to maintain a preaching minister: this was not a charitable use named in the statute; yet by the Lord Keeper and two judges it was decreed to be good, and a charitable use within the equity of the statute. By parity of reasoning, all charitable donations now made to many of the charities now subsisting, which had no existence at the time of the act (A. D. 1601), are good under the same statute, and therefore liable to the same examination. But it was held also, that a school, unless it be a free-school, was not a charity within the provision of this act, and consequently the inhabitants had not a right to sue in the name of the Attorney General—but the practice is now different. It was held also, that this act supplied all defects of assurances, by any misnamings (in addition to the 14th Eliz. c. 14. already mentioned), provided the donor had a good disposing power in him—and thus the favourable construction to all charity acts, which was a maxim universally held and adopted in those days, induced them to establish a devise of lands to a charitable use, notwithstanding the many previous restraints of *Mortmain*, under the construction of the words *limited and appointed*, used in this act; and it was allowed that the devise was void in law, but it was good as an *appointment*, under the statute, even

even without a surrender, if it was copyhold; but a parol devise being defective as a will, could not be admitted as an appointment. So where lands were devised to a college to maintain scholars, it was declared that the corporation were trustees for the scholars, who made a part of the corporation themselves, and was an appointment within the statute. Thus pious and worthy men, seeing how much the Court of Chancery favoured this and the former act, and the construction of trusts which was every day put upon it, instead of devising their lands immediately, devised them to trustees, with appointments to pay the rents and profits to certain charitable uses.

Hob. 136.
1 Lev. 284.
Prec. Ch. 391.

Postea
1 Black. Rep.
901

Duke, 49.

Seisin was given of lands in the grantor's lifetime, and a rent-seck thereout to take effect at his death: this was held good, though the rent did not then take effect, or was then *in esse* at the time of the seisin given. But there was much equity in the following decision: If land be given or vested in trustees for a charitable use, and be by them misemployed, a purchaser who had notice of the gift, should not be chargeable, further than during his own time, for the arrears; but where the rent had been concealed, he would be liable for the whole arrears; for the land was a debtor, and *transit cum onere*. But this is a case which, in the regularity and caution of most modern conveyances, can now scarcely ever happen.

But to shew further how much the court favoured this statute, take the following case.

A feme

Moor, 822.

A feme covert made a will, bequeathing part of a debt due to a former husband, to whom she was administratrix, to her relations, and the residue of it to a charity, and died in the life of her second husband : her executors refused to meddle with the debt, because she had it but as administratrix, and could not make a will, and because it was a chose in action ; whereupon administration of the goods unadministered of her first husband, was committed to Damas and others ; and they had thereby debts of £. 2000, besides the debt so bequeathed by her. On an inquisition and decree under this act, the court decreed, that though the will was void in law, yet it was good ; it would serve for a declaration upon the statute ; so that if there were assets of that estate, or of *his* own estate, that was to *execute* it, the use should be supported ; for the goods in the hands of administrators, were all to go and be employed to charitable uses, and kindred and children could have no property nor pre-eminence in them, but under the charity of the ordinary. It was confessed, that when the decree was made by the Commissioners, the estate would have borne it, and there were assets ; and therefore there was negligence in the management of the estate : whereupon Damas was compelled to pay the charity legacy, and to take the help of the court for recovery of the debts of the intestate.

Owen, 33 and 34.

So when executors, having effects of their testator to dispose of to pious uses, they could not forfeit them, for they were not in their own use ; but their own power is subject to the control of the ordinary, and the ordinary might make distribution of them to pious uses. And it was said at the bar, that the ordinary might make the executors account before him, and to punish them according

ing to the law of the church, if they spoil the goods ; but cannot compel *them* to employ the same to pious uses.

Again : A testator having goods left in his hands to a charitable use, made a feme covert his executrix : Her husband having no notice of the use, gave the goods that so came to his wife by will, or otherwise converted them to his own use ; the wife only was chargeable, and not the executors of the husband, unless they had had notice of the use : And if such goods were wrongfully taken away, and sold in a public market, the trespasser was to be charged with a recompence, and the recoverer would remain liable to the charity. Duke, 184.

So an administrator, *durante minori ætate*, without notice of a charitable use, employed assents to the benefit of the infant, the effects of the infant were liable to the charity ; but if he wasted the assents, he would himself be liable.

Assents, in equity, were held to satisfy charitable uses, before debts or legacies ; because assents in equity were disposable by this statute, which ordains them to make recompence ; and the equity of this statute was held to be above the equity of the chancery. But assents in law were held to satisfy debts before charity, because the common law must order their disposition ; yet charities were then to be preferred before other legacies, in disposition of assents in law—The case is much otherwise at this day, as will be proved hereafter. Duke, 186.

I offer these cases to the reader, merely to shew the spirit of those times, and the construction which even

the best lawyers were willing to extend to an act favourable to charity. These, among a variety of others, which have necessarily been examined, may sufficiently prove how very different the law is at this day, since the last *Mortmain* act made its appearance. But I shall come to that in regular course.

As the 39th Eliz. was meant to continue in force only twenty years, that short term expired in the midst of the zeal of many charitably disposed persons, who, however, having caught the example, extended their exertions beyond that period; and in order that their pious endeavours for the welfare of their fellow creatures might not be frustrated, the Parliament passed an act to render the powers of that statute perpetual, and to give the same privileges to all hospitals erected since the expiration of that term of twenty years, as they could have had under the former statute.

21 Ja. 1. c. 1.
13 & 14 Car. 2.
c. 12.

The act for relief of the poor made by Charles II. directs, that there shall be one or more corporations or workhouses within London and Westminster, and within the towns and places of Middlesex and Surry, situate in the parishes mentioned in the bills of mortality: the act establishes them into corporations, and gives directions for their government, &c.

22 & 23 Car. 2.
c. 20. s. 11.

About eight years afterwards, the commissioners empowered by the 43d Eliz. had an additional office assigned them by the legislature; which proves, that the intention was to extend their power to all charitable institutions, whether they were established into corporations or not; for in the act made for the relief and release

lease of poor distressed prisoners for debt, these commissioners are directed to use their best endeavours and diligence to examine and find out the several legacies, gifts, and bequests, bestowed and given for the benefit of poor prisoners for debt, in the several gaols of this kingdom; and to settle and order the same in such manner, that the prisoners might not be thereafter defrauded, but receive the full benefit thereof, according to the intent of the donors. The same respect was afterwards paid to the above statute of Elizabeth, which was deemed the bulwark of charities, in the act for the augmentation of small vicarages and curacies; which authorizes a perpetual proportionable reservation out of the issues of any rectory impropriate or portion of tithes, which are to be held chargeable therewith, and subject to distress or disability of the party on non-payment, notwithstanding the statutes of *Mortmain*; and it was declared, that if any question should arise concerning the validity of such grant, such favourable constructions, and such further remedy, if need be, should be had as in former cases of charitable uses.

2 Geo. 2. c. 22.
s. 7.
Strengthened by
a rule of court,
&c. 11 G. 2.
c. 20. 32 G. 2.
c. 28. s. 9. 10.
And for setting
them to work,
12 G. 2. c. 29.
sect. 23.

29; Car. 2. c. 8.

Sect. 7;

The encouragement of charitable gifts and dispositions for founding colleges and schools, was the next article on this subject, to which the legislature turned their attention, by exempting such grants also from the disabilities of *Mortmain*; but as this has already been noticed before in its proper place in the first chapter, we shall pass on to the next.

7 & 8 W. & M.
c. 37.

Notwithstanding the many attempts to settle a proper support for the clergy since the reformation, government had never been able to attain this point; by reason

26 H. 8. c. 3.
28 H. 8. c. 8.
27 H. 8. c. 17.
32 H. 8. c. 22.
c. 47.

2 & 3 Edw. 6.
c. 20.
7 Edw. 6. c. 4.
1 Eliz. c. 4.

2 & 3 Ann. c.
xi.

whereof, divers mean and stipendiary preachers were in many places entertained to serve the cures, and officiate therein; who depending for their necessary maintenance, upon the good will and liking of their hearers, had been under temptation of too much complying and suiting their doctrines and teaching, to the humours, rather than the good, of their hearers, which had been a great occasion of faction and schism, and contempt of the ministry: wherefore, Queen Anne, desirous of rendering the clergy more independent, had remitted the first-fruits and tenths of poor clergy; and by this act relinquished her whole revenue arising from that source, for the purpose of erecting a corporation, to appropriate the same for a perpetual augmentation of the maintenance of poor clergy, in places where the same are not sufficiently provided for: the act empowers the Queen to institute such a corporation, and authorizes all persons charitably disposed towards so good a work, to grant or devise their lands or goods, for the purpose of carrying its designs into execution, notwithstanding the restraints of *Mortmain*.

5 Ann. c. 24.

In consequence of this act, the Queen, by letters patent, erected the corporation, known by the title of "Queen Anne's bounty;" but the terms of the act being generally expressed, and without any exceptions as to the poorer clergy having small livings, they were still liable to the payment of this duty, which their incomes could but ill support; and several of them were, in consequence, held by sequestration by temporary curates, without being regularly filled by institution and induction; wherefore a new act was made about four years afterwards, exempting all livings of less value than

than 50 l. per annum, from the payment of this contribution; but this exemption was not to extend to the tenths of any benefice granted away by the Queen's predecessors, to any person or corporation. And by the next act, the same bounty was carried into Ireland. Cap. 25.

A subsequent statute passed in the following year, recites, that the clause of exemption mentioned in the above act, was intended only to save the rights of such persons who had grants of the first-fruits of any such benefice from the crown, previous to that act; but forasmuch as the said first-fruits, the tenths whereof were so granted, were, notwithstanding such grants, reserved to the Crown, and were then granted by her Majesty to the governors of Queen Anne's bounty, for the augmentation of the maintenance of the poor clergy and their successors; and forasmuch as the discharging of the first-fruits and arrears thereof of small livings, the tenths of which were not vested in the said governors, would be a proper augmentation of the same: It is enacted that all ecclesiastical benefices, with cure of souls, not exceeding the improved value of 50 l. the tenths whereof are not vested in the corporation, and the incumbents thereof, should be for ever discharged from the first-fruits; and the time for payment of such first-fruits, as remained liable, of considerable benefices, was extended by instalments to be within the space of four years. 6 Ann. c. 27.

This bounty was designed to extend not only to parsons and vicars who come in by presentation or collation, institution and induction, but likewise to such ministers who come in by donation, or are only stipendiary

preachers or curates, officiating in any church or chapel where the liturgy of the church of England is used, most of which were not corporations, nor had a legal succession, and were therefore incapable of taking a grant or conveyance of such perpetual augmentation, agreeable to the Queen's intentions; and in many places it would be in the power of the impropriator, donor, parson or vicar, to withdraw the allowance paid to the minister or curate serving the cure; or in case of a chapelry, the incumbent of the mother church might refuse to employ a curate, or permit a minister duly nominated or licensed, to officiate in such augmented chapel, and might officiate there himself, and take the benefit of the augmentation, though his living be above the value of those intended to be first augmented, and the maintenance of the curate or minister would thus sink instead of being augmented: wherefore, in a subsequent statute reciting these circumstances, probably from facts which had already happened, it was declared, that all churches, curacies, or chapels, which should at any time receive the intended augmentation, should then become perpetual cures and benefices, and the ministers thereof be deemed in law, bodies politic and corporate, and have perpetual succession, and legal capacity to take in perpetuity, all lands, tithes, &c. which should be granted to, or purchased for them, by the governors or benefactors of Queen Anne's bounty, or other persons contributing with them; and the impropriators or patrons are excluded from receiving any profits thereof, directly or indirectly. The incumbent, patron, or ordinary of any augmented living, may, with the concurrence of the governors of this charity, exchange all or any part of the estate settled for the augmentation thereof, for any

1 Geo. 1. c. 20.

Sect 13.

any other estate, in lands or tithes of equal or greater value, to be conveyed to the same uses: and that all lands granted for such augmentation by the governors to any church or chapel, by deed inrolled in chancery within six months afterwards, shall go in perpetual succession thereto.

It was however found, that the laws for collection of the perpetual yearly tenths, were in some cases defective, and in many instances found to be improper and inconvenient to be put in execution; by reason whereof, the late Queen's intentions could not be so easily answered, unless some new regulations were made for the more easy levying and paying the same; for remedy whereof, and that the governors might be better enabled to execute the trust in them reposed, and the poor clergy with greater ease and advantage receive the benefit of this bounty, a new collector was appointed, instead of the archbishops and bishops, who had before received the contributions, and he was directed to pay the same into the Exchequer; and thus it continues at this day. 3 G. 1. c. 10.

It is something strange, that any defects or delays should have arisen, either in the collection, the payment, or distribution of a charity like this, instituted upon the most benevolent principles, and founded by the utmost liberality in the Crown; which renounced a very considerable part of its revenue, to set on foot so noble a design!

The augmentations made by this corporation, are by way of purchase, not by pension; and the stated sum

to be allowed to each cure to be augmented, is 200 l. to be invested by the corporation in a purchase. In order to encourage benefactions, the governors are authorized to give 200 l. to cures not exceeding 45 l. *per annum*, where any person will give the same or a greater sum, or the value thereof in lands, tithes, or rent charges,

All charitable gifts in *real* or *personal* estate made to the corporation, are to be strictly applied according to the direction of the donor; and where the gift is generally to the corporation, without any particular direction, it is applied with the rest of the stock of the society. And the parson whose cure is augmented by this bounty, is to receive the augmentation free from all fees of office.

The inequality of church preferment, and the miserable poverty of some gentlemen whose education and abilities equal or surpass many of their superiors in interest and success, however painful to a reflecting mind, are yet unanswerable reasons to induce the incumbents of valuable livings (and particularly those, who keep alive in this country the remains of papal contrivance, by accepting more benefices, than they can legally hold, under the salvo of a dispensation, and leave the duty to be performed by a curate whose assiduity and diligence perhaps better deserve the benefice) to have most liberal regard to their *inferiority*, if they will call it so, and to be as ready to *distribute*, as they are to receive!

Th

The legislature has often had regard to the welfare and proper disposition of youth, in the labour of husbandry, or in trades and manual occupations; though these endeavours have not always, for want of enforcing stricter regulations, been attended with success.

Queen Elizabeth, in her last statute for relief of the poor, empowered church-wardens and overseers, by the assent of two justices of the peace, to bind out poor children taking benefit of their parish, to be apprentices where they shall see convenient, till the man child should arrive at the age of 24 years, and the woman child to 21, or time of her marriage; and the same should be as effectual as if such child were of full age, and by indenture of covenant bound him or herself. And considerable donations having been made to corporations to be continually employed in binding out, as apprentices, a great number of the poorest sort of children, from which great benefit had accrued, as well to such corporations, as to the commonwealth in general, in the saving young people from idleness and disorderly lives; and as it was very likely, that many other well-disposed people would be the better encouraged, willingly to follow the like good example, in bestowing also large sums of money to the same good and godly purposes, if it might be so provided, that such monies as had been already so freely given, or as thenafter should be given, for the binding out of such poor children apprentices, might continually remain, and be wholly employed accordingly: It was enacted, in the following reign, that all such donations should continue and remain in the hands of any corporation, or in places not incorporate, in the hands of the *parson* or vicar, constable, church-warden, collector or overseer, to such charitable uses, for the binding forth

43 Eliz. c. 2.

7 Jac. 1. c. 3.

forth so many apprentices, as the donors shall appoint by will or otherwise. The master or mistress so receiving any such fee, to be bound with good sureties to repay the same, at the expiration of the seven years for which the apprentice is bound, or if he die within that time, then within one year of his death; and if such master or mistress die within the apprenticeship, then the same to be repaid within one year, that so the same money might be again employed for the purpose of placing such apprentice with some other person, for the residue of his term, at the discretion of the trustees.

The money to be so appropriated within three months after it shall come to their hands; and if there should not then be fit and apt persons to be so bound, then such of the poorest children of any of the parishes next adjoining, shall be bound forth at the discretion of the trustees; choice being from time to time to be made of the *poorest sorts* of children, and whose parents are least able to relieve them, nor any to be above 15 years of age when first bound. Accounts to be kept of the sums received and employed, and remedies for any breach of the trust, to be referred by petition to the court of Chancery. And all persons to whom such apprentices shall be bound, might take and receive and keep them as apprentices, any former statute notwithstanding. And all fees given with any such apprentice, placed out at the common or public charge of any parish or township, or by any public charity, are exempted from the stamp duty raised upon apprentice-fees in general.

21 Ja. 1. c. 8.

1 Ja. 1. c. 25.

8 Ann. c. 9.
s. 40.

Finch, Cha.
Ca. 187.

A bequest for this purpose, to put out poor children
of

of a parish, must, under the construction of the above act of 7 Jac. I. c. 3. be paid to the parson of the parish. I have introduced these two subjects of Queen Anne's bounty, and poor apprentices, as they stood in course in the statute book, and as they are charities instituted under the immediate direction of the legislature; and thus we have again arrived at the last act of *Mortmain*, under which all charitable bequests are now subjected.

2 Vezey, 425.

By this statute already mentioned, it is enacted, *That from the 24th June, 1736, no manors, lands, tenements, rents, advowsons or other hereditaments corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled, to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever; unless such gift, conveyance, appointment or settlement of any such lands, tenements or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be and be made by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death), and be inrolled in his Majesty's high court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks, six calendar*

9 G. 2. c. 36.

No manors, lands, &c. nor money to be laid out in lands, to be given for charitable uses, unless by deed inrolled, &c.

60 CHARITABLE USES.

lendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof; and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him.

Sect. 2.

Said limitations not to extend to purchases or transfers made for valuable considerations.

Proviso, That nothing therein before mentioned relating to the sealing and delivering of any deed or deeds, twelve calendar months at least before the death of the grantor, or to the transfer of any stock, six calendar months before the death of the grantor or person making such transfer, shall extend, or be construed to extend, to any purchase of any estate or interest in lands, tenements or hereditaments, or any transfer of any stock, to be made really, and bonâ fide, for a full and valuable consideration actually paid at or before the making such conveyance or transfer, without fraud or collusion.

Sect. 3.

Gifts, &c. otherwise made, to be void,

That all gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever, of any lands, tenements or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands, tenements or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the said 24th June 1736, be made in any other manner or
form

form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void.

Proviso, That this act shall not extend, or be construed Sect. 4.
to extend, to make void the dispositions of any lands, tenements or hereditaments, or of any personal estate to be But not to prejudice the universities, &c.
laid out in the purchase of any lands, tenements or hereditaments, which shall be made in any other manner or form than by this act is directed, to or in trust for either of the two universities, within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said universities; or to or in trust for the colleges of Eton, Winchester or Westminster, or any or either of them, for the better support and maintenance of the scholars only, upon the foundations of the said colleges of Eton, Winchester and Westminster.

And that no such college or house of learning, which Sect. 5.
doth or shall hold or enjoy so many advowsons of ecclesiastical benefices, as are or shall be equal in number to one moiety of the fellows or persons usually stiled or reputed as fellows, or, where there are or shall be no fellows or persons usually stiled or reputed as fellows, to one moiety of the students upon the foundation, whereof any such college or house of learning, doth or may by the present constitution of such college or house of learning consist, shall from and after the 24th June, 1736, be capable of purchasing, acquiring, receiving, taking, holding or enjoying, any other advowsons of ecclesiastical benefices, by any means whatsoever; the advowsons of such ecclesiastical benefices as are annexed to, or given for the benefit or better support of the headships of any of the said colleges or houses of learning, not being computed in the number of advowsons hereby limited. No college to hold more advowsons than equal to one moiety of their fellows, &c.

And

Sect. 6.

Not to extend to
estates in Scot-
land.

And that nothing in this act contained, shall extend or be construed to extend to the disposition, grant or settlement of any estate real or personal, lying or being within that part of Great Britain called Scotland.

Notwithstanding the prohibition in this act is so clear and general, yet since the making of it, several cases have occurred in the courts, which will materially guide us in the endeavour to point out the extent of its meaning, in the several kinds of devise which it forbids. And when we compare this, with the variety of acts which have preceded it, we cannot but observe, that the spirit of it militates against the doctrine established by several of them; particularly the 43d of Eliz. and the manner in which we have already seen, that act was so liberally expounded: every subsequent act contradictory to former statutes, or which directs any new method of doing the same thing, although not in express words repealing, yet must be considered and taken as a repeal of them, so far as it contradicts them; thus the cases and decisions under the 43d of Elizabeth, cannot all be taken as precedents for modern determinations; and the new act by almost subverting the old ones, has opened a new source of legal knowledge, which for the sake of promoting and securing to the many new institutions of charity which have sprung up within the last few years, deserves, and is the present design, to be investigated.

1 P. Wms.
249.New instituti-
ons included in
the act, whether
hospitals or not.

It may not be improper to premise, that although many of these late institutions could never be named in these acts, yet from their nature, such as dispensaries, contributions for different charitable purposes, as for the relief

relief of the poor, for the discharge of prisoners for small debts, for the Sunday schools, for the black poor, and the like, they are all subject to the same restraints of *Mortmain*, and the direction of visitors for mis-employment of their property, and are all under the regard and relation of his Majesty's Attorney General, and derive their patronage from the crown, as effectually as if they had been named in the several acts already recited. And this opinion is in great measure confirmed by the legislature itself in the annual acts of land tax, where it is always provided, that all such lands revenues, and rents, *settled to any charitable or pious use*, as were assessed in the 4th year of William and Mary, shall be liable to be charged; and that no other lands, tenements, hereditaments, revenues, or rents, whatsoever then settled to any charitable or pious use, shall be charged. But on this head more hereafter.

3 Burn Eccl.
Law, 315.

It is incident to every corporation to have a capacity to purchase lands for themselves, and successors, and this is regularly true at the common law; but they are excepted out of the statute of wills, so that no devise of lands to a corporation was then good, except for charitable uses by the 43d Eliz. which exception is again greatly narrowed, (says Mr. Justice Blackstone, on treating of this subject) by the above statute of 9 Geo. II. c. 36.—So that now, a corporation, whether *ecclesiastical*, or *lay*, cannot purchase without license from the crown, though that capacity seems to be vested in them by the common law:—And such charities which have not this license, which is now granted by act of parliament, charter of incorporation, or letters patent, are reduced to the necessity men-

Of purchasing
lands.

10 Rep. 30.

34 H. 8. c. 5.

Hob. 136.

43 Eliz. c. 4.

tioned

tioned before, of choosing from among themselves, certain persons to be trustees, and to purchase in their names, and take the lands in trust for the charity; for if they were bought in the name of the institution, not being incorporated, they would instantly vest in the crown, as a forfeiture in *Mortmain*.

9 G. 2. c. 36.

2 Burn Eccl.
Law, 477.

2 Atk. 36.

Barn. Ca. Cha.

7.

1 Vezey, 33.
Atty. Gen. v.
Lloyd.

No manors, lands, &c.] The first material case that occurred after the making this statute, is that of *Ashburnham* and *Bradshaw*; and as the chief question in the cause appeared to be a point of law arising on the construction of a new act of parliament, which had never come in judgment before, and to be a matter of great importance, the Lord Chancellor thought it fit, in order to the settling the law thereupon, that the opinion of all the judges should be taken. Robert Bradshaw made his will in 1734, and devised divers lands, and tenements, to trustees, and their heirs, in trust, or for the benefit of certain charitable uses therein mentioned, amongst several other trusts. The above statute for restraining dispositions in *Mortmain*, took place in June 1736.—In July following the testator died, without revoking his will: the question was; whether such gift or devise, so far as the same relates to the charitable uses, was good in law notwithstanding the statute? And all the judges, except Mr. Justice Denton, who was ill and absent, certified that the gift or devise, so far as related to the charitable uses, was good in law, notwithstanding the statute; and thereupon the court established the will, and decreed that the trusts of the charities should be carried into execution; on this reasonable ground, that the will was made and dated before the act, although the testator died after it had taken effect.

But

But in the case of *Willett v. Sandford* — The testator *Windowe* made his will in 1734, devising the bulk of his estate to trustees, to certain trusts, and particular lands to charitable uses.—The act passed in 1736; and in 1744, by a codicil, he added new trustees, and confirmed his will.—The devise to the charity was declared void; for the republication of the will by the codicil, after the act, rendered the devise clearly within the statute. But in *Attorney General v. Andrews*, a devise of copyhold lands not surrendered to the use of a will made before the statute, was held good, as not within the last *Mortmain* act, on the principles of the foregoing cases; nor within the statute of frauds; and good also by way of appointment under 43d Eliz.

1 Vezey, 178.

1 Vezey, 225.
2 Wms. 262
Barnard. 9.

Before I proceed further, the following case may serve to elucidate this part of the subject, and I rather extract it from the manuscript of a gentleman formerly very eminent at the Chancery Bar, and communicated to me by an able friend, to whom I am often obliged during the course of this work, as the Chancellor's opinion seems here more fully preserved: but it is reported by *Barnardiston*, p. 130. *in 3. Ark. 141.*

The testator *Lawrence Hollister*, by will in 1725, disposed of his estate for the building of a charity school, and other charitable purposes. Then came the statute of 9 Geo. II. c. 36; and the testator apprehending, that this disposition would come within that statute, and be avoided thereby, made another will on 1st August, 1738, whereby he devised the premises to defendants William Cann and Mary Andrews, and their heirs, without any trust appearing on the face of the will.

Adlington v. Cann.

F

But

But on 9th of same Aug. he subscribed a writing, which was found after his death, wherein he recommends to his executor William Cann, 'to assist Mary Andrews, and to see the will performed according to his humble request, and according to the wonted and well disposed charitable disposition of said Cann towards all men, to bring the whole affair to its desired issue.' The testator died soon after, and the plaintiff, who was his only daughter, and heir at law, filed her bill to have the devise set aside, as void by the act.—The defendants insisted on the will, as an absolute gift to them; and that no parol evidence of a trust for a charitable purpose, was to be admitted by the statute of frauds and perjuries (29 Car. II. c. 3.): and denied their ever having seen or heard of any other writing, but the above paper, signifying any declaration of trust concerning any charitable use, or that any such directions as are mentioned in the above paper, were ever given by the testator to Mary Andrews.

It was in proof, that the testator had, a little before his death, given directions for drawing a plan of a public building; and several witnesses were likewise examined, to prove his intent to leave his estate for the building a school or hospital.

The question was, whether here was a specifick declaration of trust, for a charitable purpose, to bring the case within the 9th Geo. II? and whether to bring it within that statute, the trusts must be sufficiently declared within the statute of frauds and perjuries? And lastly, whether the above paper was a sufficient declaration within the last mentioned statute?

Lord

Lord Chancellor, *Hardwicke*, said, he was under some difficulty about determining this point, from fear of breaking in upon the statute of frauds on the one hand, and the statute of *Mortmain* on the other.

The question has arisen purely from a mistake of the testator, who thought that his first will, though made before the statute of *Mortmain*, might be affected by it; which it could not have been, as was certified to the court by all the judges in the above case of *Ashburnham* and *Bradshaw*.

The first question is, whether the present case is within the statute of frauds and perjuries?

His Lordship said, he thought it was; he should do greater mischief by determining it otherwise, than by leaving a loop-hole to elude the statute of *Mortmain*, in some instances: devises to charities, and charitable uses, have been held, over and over again, to be within the statute of frauds and perjuries. It has been endeavoured, indeed, to make wills, not properly executed, within that statute, to operate as appointments, but this could never prevail. And therefore in all cases of charities, that have come before the court, it has been held, that the declaration of trust for a charity, must be express as the statute of frauds and perjuries directs.*

So

* 29 Car. II. c. 3. s. 7. It is enacted, that all declarations or creations of trusts, or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trusts,

So it was determined in the case of the *Attorney General v. Spillett*, heard first by Lord Talbot, and then by his Lordship in 1739, though there were some very strong circumstances in that case to have supported the charity. It was said indeed, that the words of the statute of *Mortmain* are so general as to take in every trust, whether by parol or writing; and that this being a later law than the statute of frauds, is not bound to be construed by it. But he was of opinion, that the source of a trust, or declaration of trust, in the statute of *Mortmain*, ought to be directed by the statute of frauds, which did *Normam imponere futuris*, as to the meaning of the word *trust*, what should, or should not be a trust.

So upon the popish act, 11 and 12 Wm. III. whereby devises in trust for Papists are made void: The definition of a trust is taken from the statute of frauds. And if a bare parol averment of a trust for a charity, upon a will, was to be allowed, the statute of *Mortmain* would be attended with much more mischievous consequences than ever it can do good.

The next thing to be considered, is, whether this paper be a sufficient declaration of trust, within the statute of frauds? which depends upon the words of it; and he thought it was not. Had the testator made a feoffment to himself, and his heirs, this paper might have been a good declaration of the use; but here we are in the case of a will, which passes both the legal and the beneficial interest to the devisee. The

or by his last will in writing, or else they shall be utterly void, and of none effect. &c. &c. &c. See the act itself.

will

will is dated 1st August, and the paper the 9th August ; so that if the paper does any thing, it must enure as a revocation of the will ; which it cannot do, for want of proper execution within the statute of frauds ; as trust and equitable estates can no more pass by any writing, not properly executed within that statute (i. e. by sect. 5, in presence of three or four witnesses), than legal ones can. And here being no sort of fraud, nor misrepresentation proved to be used on the testator, he thought this was not a sufficient declaration of trust within that statute.

But supposing this a case not within the statute of frauds, and that it might admit of parol evidence to prove the intent : Is there any proof that the testator intended that the whole of his estate should go to charitable uses ? which must be ascertained, and the quantum appear, which he intended to give, before it can be decreed how much must go that way. It is expressly sworn by the defendant *Andrews*, in her answer, that the testator once talking to her about the estate, said, that he had given her, and the other defendant, his estate by will, “ to dispose of as they pleased ” ; and had at another time said, “ don’t dispose of too much of it.”—Now even admitting this not to come within the statute of frauds, still here is no rule to draw the line by, how much shall go to this charity. He may have given these two persons his estate, to carry on his intent of building a school ; but the quantity that shall be applied that way, he has left to their discretion : and therefore how can the court determine what part to let the plaintiff into ? This is a case which can scarcely be preceded : few people will leave their trustees such unlimited power as

this testator has done: the many abuses of trusts, are a sufficient warning against it.

The last consideration is, what is proper for a court of equity to do in the present case. His Lordship said, he was under no obligation to make a decree, as the party could have a remedy at law: and indeed this is a mere legal title. The statute of *Mortmain* avoids the devises to charitable uses; so that it is the devise of the legal estate itself, not barely of the trust, which is made void, and is just the same as a devise in trust for papists, within 11 and 12 Wm. III. where not only the trusts, but also the devise of the legal estate itself, is made void: In the case of *Carrick v. Errington*, 2 Wms. 361, which was upon a conveyance, the whole was held not to be void, because part of the trust was for children unborn; whereas had the trust been for all papists, the whole devise of the legal estate had been void.—I can therefore do but one of two things; either retain the bill, and give the plaintiff opportunity to bring an ejectment, it being a very hard case upon her, who is an only child, and disinherited; or else dismiss the bill without costs.

The parties immediately chose to have the bill dismissed without costs.

The act was not meant solely to restrain devises of lands to charities, but also to prohibit any devise of lands to trustees to sell them, and convert the produce of the sale to such purposes: This point was decided by Lord *Henley*, in the case of *Attorney General v. Tindal*, in 1764, which, as it was founded on several cases,

cases, that are necessarily classed under that part of this tract which treats of money or effects to be laid out in lands, I shall beg leave to refer the reader thereto for the present, while a few words are offered relative to the next article in the act, namely, rents.

Rents.] By this word in the outset of the act, it is clear the legislature meant to forbid a man bequeathing a lease, or a leasehold term, or premises held on lease for years, or money to be laid out in the purchase of a lease for years, to a charity; for though that is merely personal estate, yet it is an incumbrance upon the land, and the act forbids the giving any charge or incumbrance *affecting any lands*: and if the rents should remain unpaid, a charity could not proceed by distress; for this would be putting itself in the condition of an owner of land, which it could not take by devise, or purchase. But a charity may hire a house or lands in the name of some of the trustees; and if they are disturbed in their possession, they will be accountable to the charity for all the damages they shall recover against the trespasser.

² *Vezey*, 183.

Duke, 143.

But an estate held for charitable purposes, prior to this act, will still be preserved thereto, and the court will always support a charity whether incorporated or not, with its utmost aid, and will rather settle its right, than dismiss an information.

¹ *Vezey*, 43. 72.

Previous to the surrender of all the charter lands of *Newcastle-under-line*, to the crown, in 1684, a lease for 1000 years was privately granted to one *Ballard* and others, in trust to permit the corporation to dispose of the rents and profits thereof, for the maintenance of a

Attorney General v. Lord Gore.
Barn. Ca. Cha.
151.

minister, and relief of the poor inhabitants of the borough, in such manner as the corporation should think proper. The lease lay dormant many years, till the executor of the last surviving trustee assigned it to *Offley*; and during the interval, the corporation continued in possession of the premises, and managed the estates themselves, as they had done before; out of which they maintained the poor, for whom there was no rate. Information was filed against the corporation, to establish the lease and assignment for the residue of the term, and the charity to which the lands were subject; &c. As to the charity, Lord Chancellor *Hardwicke* said—It has been said, that whatever becomes of the term, or the assignment, it appears that the estate was applicable to a charity, and that upon that ground this court ought to interpose. And in that it has been rightly said; for if an information is brought in the name of the Attorney General, and it appears that there is a charity which this court ought to support, though the information is mistaken in praying such relief for the charity which cannot be had, yet the court will not dismiss the information, but will support the charity in such manner as can be by law. It has been said, that there does not appear to be sufficient evidence to shew, that this estate belonging to the corporation, was subject to a charity; but that does sufficiently appear. It is recited by the lease of 1684, that the issues of these lands were employed towards the relief of the poor inhabitants of the borough, and the minister of the town, and other pious uses. This is evidence, that antecedent to the lease, the rents used to be employed in that manner. And though it is suggested that this is a fiction in the recital, yet, his Lordship said, he would not presume

presume it to be so, unless evidence had been shewn, that before the making that lease, the rents and profits were applied in a different manner; but no evidence of that sort has been given. And it appears too, from expressions dropped in the entries in their books, that some of their estates were given them by private donors for charitable purposes. The usage likewise since that time, is evidence of the usage precedent; namely, that the rents and profits were so applied before that time; and since that time, the profits of these estates have been employed for this purpose.

The minister has been maintained out of them, not indeed by having a certain allowance, for sometimes he has had 20l. sometimes 15l. per annum, and sometimes nothing; and the poor have been maintained out of them constantly. There have been no instances of a rate in this town made for their relief.

For these reasons, his Lordship's opinion was, that the charity must be established; however, it deserved consideration in what manner it should be established.—He said, the charity must be so, which is for the support of the minister; the difficulty is concerning the quantum he must have. The right way is to decree these estates to be subject to the maintenance of the minister, and the other charitable purposes, according to the discretion of the corporation; with liberty to apply to the court in case the corporation do not exercise their discretion in a reasonable manner.—And so decreed.

Stocks in the public funds,] This is the principal part of the prohibition against bequeathing personal estate

to be laid out in the purchase of land; and which the act directs shall be *irrevocably* transferred at least six months before the donor's decease, and be made to take effect in possession, *for the use intended*, immediately from the making such transfer.

But it may not be improper once for all, to observe, that in this and all other cases, if a man desires to promote the good designs of any charitable institution, he had better give or bequeath a specific sum of money; the executors must provide for it out of his personal estate, and stocks will always be assets in their hands for this and other purposes.

2 Burn Eccl.
Law, 478.

Money, goods, chattels, stocks, securities for money, or any other personal estate, to be laid out in lands, &c.] Although these are expressly within the statute, and are fully prohibited to be laid out, or disposed of in the purchase of lands, &c. for charitable uses; yet money, &c. given generally is not forbidden: so also the residue of a personal estate hath been decreed not to be within the act; and if money be given to be laid out in "*lands, or otherwise*" to a charitable use, it has been determined, that such devise is good, by reason of the words, *or otherwise*; as in the case of *Soresby* and *Hollins*, August 6, 1740; which being a decision upon the express merits of the late act, I shall beg leave to insert it at length, especially as it contains Lord Chancellor Hardwicke's exposition of the statute, in the making of which he seems to have been concerned.

John

John Naylor in 1738 made his will in these words :
 " I will and desire that my executors within twelve
 " months after my decease, *do settle and secure by pur-*
 " *chase of lands of inheritance, or otherwise* as they shall
 " be advised, *out of my personal estate*, one annuity, or
 " yearly payment of 50*l.* to be paid yearly, and distri-
 " buted for ever by my executors, their *heirs and assigns*,
 " among the *poor and indigent people* of Leeke, in Co.
 " Stafford, in such manner as they shall think fit.—And
 " my will *also is*, that my executors *do settle and secure*
 " one other annuity of 5*l.* to be paid yearly to the
 " Vicar of Leeke for the time being, for ever, for
 " preaching an annual sermon on every 12th day of
 " October." And the testator devised the residue of
 his personal estate, to be equally divided between his
 sisters Mrs. Soresby, and Mrs. Hollins.

By Lord Chancellor Hardwicke, the only question in
 this case is, whether the devise of the two annuities of
 50*l.* and 5*l.* to charitable uses, is void by the late statute
 of *Mortmain*?

It is insisted upon by the plaintiffs, the residuary
 legatees, that it is void; because the direction of the
 devise is, to settle and secure the annuity by a trust of
 lands of inheritance: and though the words, *or other-*
wise, are added, they will not vary the case; for Mr.
 Naylor's intention was, to give the annuity out of lands
 of inheritance. But I am of opinion upon this act of
 parliament, that this bequest was not void, and that
 there is no authority to construe it void, if by law it
 can possibly be made good. The act of parliament is
 not at all aimed against perpetual charities, merely as
 such,

such, or to prevent the establishment or creation of them; but is designed against the cases of perpetual charities in lands, and (as the title imports) to restrain the disposition of lands, whereby the same become unalienable. The whole recital, and enacting part of the statute, take notice only of the unalienable disposal of land, whereby heirs are disinherited; and therefore the alienation or conveyance of lands to such purposes are prohibited. And though there is a clause to prohibit money being laid out in lands, to such purposes as would make them unalienable; yet there is no restriction whatsoever upon any one, from leaving a sum of money by will, or any other personal estate to charitable uses, provided it be to be continued as a personalty; and the executors or trustees are not obliged, or under a necessity of laying it out in land, by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will, fall within the restraint and prohibition of the statute. And in the first words they do fall within them; for the testator directs, that his executors shall *settle and assure by purchase of lands of inheritance*; and if the testator had rested upon such first words, the devise had been clearly void. But then he goes on, in the disjunctive, *or otherwise as my executors shall be advised*. And if a devise in a will is in the disjunctive, and leaves to the executor two methods to do a particular thing by, the one lawful, the other prohibited by law; can any court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for if one bequest is lawful, that shall be pursued, and take effect.—It hath been further argued against the devise, that the words (*for ever*) shew, the annuities must arise out of some real estate, which

which only is capable of supplying them for ever : For personal funds are too perishable and transitory in their nature, to answer such everlasting annuities : And suppose a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity ; it may so happen that the company may be quite dissolved, or that stock may fall, or interest be so reduced that half the annuity may not be produced. But these objections may be over-ruled. For if the company should be dissolved, the principal stock may be taken out, and vested in some other company. And there may be annuities that may probably continue for ever, and yet not payable out of land. I will mention an instance of one, which has lasted a century and half, and may exist perpetually ; which is Sir Thomas White's charity, being a disposition of money to be employed by continual rotation, in loans to poor tradesmen, of several sums to be lent for a settled number of years, and then to be repaid. And any man may at this day give, by will, a perpetual charity in this manner. But if a man by will secures such loans by lands or purchase of lands ; such devise shall be void, and contrary to the late statute of *Mortmain*. If this case had been to be considered by the court, before the act, it would, as the safest method to secure the charity for ever, have recommended and directed a purchase of lands ; but when this court is precluded from doing it in this manner, if it can be obtained in any other, there is no reason to say the devise is void.—It is said too, that the words *heirs and assigns* import a purchase in land, or some real thing ; for no personal thing can descend to *heirs* : and if the money is to be invested in a personal security, it will not go to the heirs, but to the executors ;

tors ; and so the intention of the testator will not be pursued. I will suppose, an obligor binds himself, his heirs, executors, and administrators, in a sum of money to a papist, who obtains judgment on the bond, and takes out an *Elegit* ; in this case I think it has been held at the assizes, or at least it might very well have been so held, that the papist cannot maintain an ejectment ; and yet the bond is good to bind the person of the obligor and his personal representatives, but not to charge his land, or his heirs who represent him in his landed capacity. And this comes up to the present case, which may secure the charity in a double sense, either upon land or personalty, if the law would allow both ; and if the law prohibits one only, it certainly allows the other. And I am of opinion upon the whole, that there is nothing that makes this bequest void in every part ; but that it is good in that way which the law does not forbid. But I would not have it questioned, if a man should by his will direct a sum of money to be laid out in land, or upon rent charge to be secured upon land for any charity, and in mean time (till it can be laid out) to be invested in government securities, for the benefit of the charity, but that *that bequest* will be void ; because the final end and intention of such testator was, to dispose of his money in land, and the investiture of it in government and personal securities, was but to secure it till a proper purchase of land, or rent charge offered. As to the annuity of 5*l.* there are fewer objections to *that* than to the other ; for there is no direction at all for any money, or personal estate to be laid out in land ; for the executors are only willed to *secure and settle 5*l.* a year*, for the purpose there mentioned, and it must be secured upon a personal

sonal fund, consistent with the will and intention of the testator, and not contradictory to the words of the act of parliament.—And as it is often said in old books, that “I was by at the making of the act of parliament, and “the meaning and intention of it was then said to be “this or that;” so I was by at the making of this statute; and it was at that very time said by the legislators, that it would not hinder any charitable distribution of a personal estate. Therefore it was decreed that the devise was good, and that the money should be invested in South Sea Stock, for the charitable purposes mentioned in the will.

I have been favoured with the two following cases on this point, by a friend, eminent at the bar.

Wm. Grimmett by will, dated 13 March, 1749, devises to his brother Jas. Grimmett, 20l. a year, during his life, to be paid him half yearly, out of the interest money in the public funds, or mortgages, or any his real or personal estates of which he should stand invested; and gives the residue of his real and personal estate to his wife, for life, and to dispose of at her death; and then directs the remainder of his estate after his wife's death, to be divided into 24 parts, 19 of which he disposes of; and by codicil, dated the next day, he limits the remaining $2\frac{5}{4}$ ths, after the death of his wife, and payment of his debts and legacies, and also the 20l. a year, after the death of his brother, to be applied in clothing and educating twenty poor boys, sons of parishioners of Brighthelmstone, in Suffex, in the principles of the protestant religion, agreeable to the present national and established church of England, &c. and that the

Grimmett v.
Grimmett.
20 Feb. 1754.
Lord Chancellor
Hardwicke.

the $\frac{5}{4}$ ths of his estate after his debts and legacies paid, together with the 20l. a year after the death of his brother, or which should be deemed as an equivalent to the 20l. a year, 570l. to be invested in some of the public funds where there is a parliamentary security, to stand in the name of the trustees, until the whole can be laid out in the purchase of lands to the satisfaction of the governors and trustees, whom he appointed; which lands are directed to be purchased in the names of the trustees to the uses aforesaid; that is, the interest, profits, and rents of the $\frac{5}{4}$ ths of his estate, together with the interest, profits, and rents of the said 570l. after the death of his brother, or the lands which should be purchased therewith, should be applied annually *for ever*, in clothing and educating twenty poor boys, as aforesaid.—The testator left no real estate.

Two questions—1. Whether the devise to the charity is within the statute of *Mortmain*, and void?

2. If it is, where the money so devised shall go? whether to the next of kin of the testator, or pass to the wife as part of the residuum?

On behalf of the charity was cited Soresby and Hollins, [see page 75] and Grayson and Atkinson, 7 November, 1752.

Lord Hardwicke Chancellor.—Q. If this is a good and valid disposition of the 570l. and $\frac{5}{4}$ ths of the remainder of testator's estate, or void by the statute of *Mortmain*?

I think

I think it would be hard construction to say, such a charitable bequest is void by statute. If a person directs money to be laid out in lands for a charitable use, it would be void, although the court would order the money to be placed in the funds till the purchase is made: so where a man gives it in such a manner, that the land to be purchased, is the final end and thing given. But where there is sufficient room for the court to say, there is a discretionary power in the trustees to lay the money out, one way or other, either in the funds or in lands; I have determined such a devise to be good, as in *Soresby and Hollins*, and *Grayson and Atkinson*. I am of opinion there is room to construe this bequest with such latitude.

I do not lay any weight on the directions to place the money in the funds, in the first place; for that would be to make the validity of a will depend on the order of the words: the direction is, *to place the money in the funds, until laid out in lands to the satisfaction of my trustees*: when can that be? not while this statute is in force. Suppose it had been, *if by law it may be*, such bequest would be good. Those words must mean when the trustees approve of laying it out; that cannot be while the statute of *Mortmain* is in force; it would be to act contrary to their trust.—It was said, the rule of construction as to devises of money to be laid out in lands, is the same now, as it was before the statute of *Mortmain*; that is true. But suppose the trustees in this case would not act; the trust would devolve on the court; and I would order the money to be placed in the funds, and not invested in lands. Sir J. Jekyl always did so, before the statute. I would not be

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understood to set up a different rule of construction of wills since the statute of *Mortmain*, from what prevailed before ; this would, in my opinion, have been a sound rule before the statute.

An observation arises on the face of the will ; as if the testator had thought this bequest might continue on government security for ever.—He directs the application of the interest, profits, and rents, of the $\frac{5}{24}$ ths, and of the 57ol. or of the lands which should be purchased therewith.—It being in the disjunctive, seems to give an election—the words *for ever*, are applicable to both alternatively. No mischief will follow from hence ; this is a different sort of charity from those pretended ones in the time of popery and monkery.

English v. Ord.
9 July, 1754.
Rolls. Clark,
Master.

John English, 14th January, 1753, made his will, and gave his debts, securities, and ready money, to trustees, in trust, until they could meet with a purchase of lands, and should actually purchase the same, to pay the interest of 12ol. to and among such poor and necessitous persons inhabitants in the town of H. as his executors should think proper objects of charity : and willed that the trustees as soon as they could meet with a suitable purchase, should lay out 12ol. in the purchase of an absolute estate of inheritance in fee-simple, of messuages, lands, &c. to be conveyed and assured, and vested, in trustees for ever, in trust to pay and apply all the rents, &c.

Clark, Master of the rolls, said, that Lord Chancellor declared, that he did not think the case of *Grimmett* and

Grimmett, clear; and that, if there had been express words of direction to trustees to invest, &c. it would be within the statute. He was of opinion that the second clause was directory, and not discretionary: He was not for carrying the case further than *Grimmett's*, and decreed the devise void. [See 2 *Vezey*, 182.] Ante.

In *Arnold v. Chapman*, the case was, that Mr. 1 *Vezey*, 108. Emerson devised a copyhold estate to Chapman, he causing to be paid to his executors 1000l. and after payment of debts and legacies, the residue of all his estate freehold, copyhold, leasehold, plate, rings, stock, &c. he gave to the *Foundling Hospital*.—The charity insisted that the assets should be marshalled, and the debts and legacies charged on the real estate, that the personal estate might go clear to the charity: The devisee of the copyhold insisted, that the 1000l. should not be raised at all; for that it was the same as if the condition was to pay to the charity, which was an unlawful act, that could not take effect, and therefore void, and the estate absolute. The next of kin insisted, that as by the statute of *Mortmain*, it was void as to the charity, and as the devisee could not take without performing the condition, it should go as part of his estate undisposed of, according to the statute of distribution.

L. Hardwicke, Chancellor, said; The Foundling Hospital is certainly a good and laudable charity, and should receive all possible encouragement; but the rules of law cannot be broke into, and laid down different for that, from all other hospitals in the kingdom. Had he devised the copyhold estate, on condition to pay 1000l. to the governors, it would have been void by the

statute ; he has taken another method, by including it in a residuary bequest of real and personal estate : and it is said, that they can take, because by giving it to executors, he has made it part of his personal estate ; and he may undoubtedly, if he pleases, turn it into personal estate ; but it must be for lawful purposes. But here the act intervenes ; which, if this was allowed, would be easily evaded ; for it would be only directing the real estate to be sold, and the money to the charity : In the case of James this was determined to amount to a devise of the land itself ; because all charges, trusts, sums of money, &c. devised out of land to a charity, are made void by the act. It is said the assets should be marshalled ; and this case put, that since this act, a man may say he charges his real estate with debts and legacies, and gives his personal estate to a charity : possibly that may do ; but it would go a great way towards overturning this act : but as to that I will give no opinion ; for there an intention appears in the testator ; here, no exoneration is intended by the will. As to the rule of the court of *marshalling assets*, I must take it to be the same as it was before the statute :* and if

Mogg v.
Hodges, 1750.
2 Vezey, 51.

* Jane Churchill directed her real estates to be sold, her debts and legacies to be paid out of her personal estate, and residue to her trustees, to be distributed in charities as they should think proper, particularly recommending to them the hospital at Bath. The trustees agreed that all money arising from a real estate, is to be accounted as real ; the bequest was so far void, by 9 G. II ; but desired, that in compliance with the intent of the testatrix, the assets should be so marshalled, that all the other legacies should be paid out of the real estates, and so the personal go to the charity.

Lor

if 1000l. was devised, and debts charged on real and personal estate, the rule before the statute was, that the debts should be paid out of the real estate, and the legatees should come on the personal. The court will do the same now; not by way of standing in the place of creditors, but by turning the debts on the real estate. But that is no rule, for that where real and personal is charged, and the residue given to a legatee or children, the court would in such case turn the charge on the real, to give the whole personal estate to the legatee. In case of *papists*, the court would not do for them, what it would not do for any one else; and this is a stronger case than that. In *Roper v. Ratcliffe*, it was resolved, that whatever is taken out of the real estate, shall be considered as real; and this would be taking out so much of the real, for the charity; which therefore shall not go to it. And the legacy was decreed to the heir at law, and not to the devisee, because it was well made on the real estate, but not well disposed of, by reason of the act; but for this point, we must refer to the case itself,

The first clause of the statute 9 G. II. c. 36. was intended to relate to gifts or conveyances to a charity

1 Vezey, 222.
Atty. Gen. v.
Day.

Lord Chancellor said, This is contrary to the express direction of the testatrix, who desires first that her legacies and debts should be paid out of the personal. In *Dalton, v. James*, the debts and legacies were charged on both estates; but the assets cannot be so marshalled to support a legacy contrary to law: decreed that the trust must either take effect according to the whole intent, or not at all; and as all money, arising from the sale of a real estate, was still to be accounted as real; so all lands to be bought with personal, were still to be considered as personal.--*Ex relatione*.

by way of donation; and it is plain, that the legislature did not intend absolutely to forbid all kind of purchases of lands for the benefit of a charity; but has put them under some restrictions. The proviso was inserted in the house of lords, upon mention of the case of the charity of queen Ann's bounty; which could not otherwise have gone on; as the method of executing it, is, that the money arising out of that fund is laid out in purchase of real estate, for the augmentation of poor vicarages. Another consideration was, that this was not intended to prevent the execution of charities already established; in several of which the funds are vested in trustees with intent to be laid out in lands; particularly *Dr. Ratcliff's* charity; but to leave them open, restraining the increase of such donations *in futuro*; that it should not be in the power of any person, or of a court of equity, to direct subsequent gifts of money to a charity to be laid out in land; for if that was their meaning, they might as well have rejected the whole bill; as the consequence would be, that a person might leave 3000*l.* to his executors, who might bring a bill in equity, praying a decree for laying it out in lands: yet in this very clause, relating to purchases, it might be considered how far they are taken out of the statute. The meaning was, that where such purchases are made, they should not be left precarious in point of time: so that though the party should happen to die within the twelve or six months, yet the person who paid the money, should not lose his purchase, or be put to risk the recovery of it back, as there might not be assets, or stocks might fall. But then the money must be actually paid; in which I doubt, whether the other restrictions, exclusive of the limitation in point of time in life of the party,

party, will take place on this proviso, and am rather of a different opinion; for sometimes the money is paid on articles before a perfect conveyance, and then it would be sufficiently taken out of the act, notwithstanding the circumstance of deed indented and inrolled, is not complied with; the intention of the act being complied with by the actual payment and conversion made of one kind of estate into another; but in the present case the money was not paid.

Such was the opinion of Lord Chancellor Hardwicke, on a material case, where one *Elbridge* being likely to die, made a conveyance of a real estate for benefit of a charity. Ten days afterwards he made a will, giving 3000l. the exact value of the lands to the same charity; and 250l. to the same; and gave the estate to two persons as tenants in common. Under a former direction, the master had reported a scheme for carrying the charity into execution, and a decretal order was made confirming the report; the devisees had acquiesced, but their heirs at law had taken upon themselves to dispose otherwise of the land; and so the charity were put to their information to seek further aid from the court: when his Lordship delivered the above opinion, and went on to say—There is something in this case, which may lay a great opening to evade the act; although *J. Elbridge* might not have intended any such fraud: but if such a precedent were made, it would be followed by a person, who, knowing if he died within a year after the conveyance, the act would make it void, gives the exact value thereof in money the same way, and then the one to be laid out in purchase of the other. The testator's intent makes it worse, and creates a reason against it:

this, though mentioned as a barbarous act, is quite otherwise; far from being a prohibition of charitable foundations, it only restrains this method; leaving the disposition of personal property thereto, free. The particular views of the legislature were two; first, to prevent the locking up land and real property from being aliened, which is made the title of the act: the second, to prevent persons in their last moments from being imposed on to give away their real estates from their families. The present case does not relate to the latter view, although that was a very wise one; for by that means in times of popery, the clergy got almost half the real property of the kingdom into their hands; and indeed I wonder they did not get the rest, as people thought they thereby purchased heaven. As to the other view, it is of the last consequence to a trading kingdom; to which the locking up of lands is a great discouragement. This indeed has not so much relation to the statutes of *Mortmain*, as is thought; which had another view, viz. of services of the crown; and therefore the reasoning, producing this act, is more like the political reasoning relating to the statute of *Westminster II*, of Intails. Then it would be inconsistent with that view of the legislature, if this court should decree this order made on the master's report (which would not have been made had it been then fully considered) to be carried into execution in the purchase of land; as it would be attended with all the bad consequences of such a devise. Where such charity is created *de novo*, the better rule is, to hold it to be laid out in some personal property, for which the funds are convenient, affording commonly a better and readier income than land; and it is worth observing

observing how early laws were made to prevent the mischief of *Mortmain*, viz. about the *third century*, by one of the first Christian Emperors.

A devise of an annuity and a sum of money to a person, and if he die without *heirs*, then to a charity:—as this would be void, if so given to a common person, so shall it be also void, when given to a charity: the word *heirs* shall not be construed to signify *heirs of the body*, where the devisee over is not inheritable. Here the devisee died in the life-time of the testator, and this determination was made on a demurrer to an information against the executors to establish the charity.

Devise over of money is void.
2 P. Wms. 369.

So likewise if money be devised *to be laid out in lands* to or in trust for any person, charged with an annual sum to a charity, the devisee will take absolutely; the charity is void: or if the devisee of lands be restrained from alienating, and if he do, then the lands to go to a charity; the legacy and devise, in either case, are void as to the charity, and will sink in favour of the specific devisee; and not go to the heir at law or residuary legatee.

Bro. Cha. Rep.
61.
Wright v. Row.
Also, Barrington v. Hereford,
1772, bef. Lord Apsley.
And Atty. Genl. v. Coldham,
1773.
Lord Apsley.

A devise of money to be laid out in land for an annuity to a minister, to preach an annual sermon, and keep a tombstone in repair, and to a corporation for keeping account thereof, was deemed a charitable use, and void by the statute. *Durour v. Motteux*, 1749.

1 Vezey, 320.

Thus an estate was devised to a corporation (which cannot take by the statute of *Mortmain*), in trust, not for charitable, but for private uses: the uses are not defeated

Bro. Cha. Rep.
81.

defeated by this deficiency of the trustee ; but the trust is sufficiently created to *fasten* itself upon any estate the law may raise : this is the ground on which courts of equity have decreed, in cases where no trustee is named ; and therefore the heir at law becomes trustee to the uses of the will.

1 Vezey, 109.

In the case on the will of *Sir John James*, a real estate was to be turned into money by a limited time, and then for the benefit of two hospitals : Lord Chancellor Hardwicke held this to be within the statute.

Fraud.
Duke, 185.

If a person who has defrauded a charity of any bequest or otherwise, purchases land in another's name, and dies ; his heir procures him whose name was used, to sell the land to another, and so the heir receives the produce thereof ; this money in the hands of the heir, shall be affets in equity to recompence the father's fraud : so if the party whose name was used, reconvey to the heir ; the land shall be affets in equity, because he comes in upon a trust descended,

Incumbrances.

2 Burn Eccl.
Law, 478.

See rents ante.

Or of any estate, or interest therein, or any ways charged, or incumbered by any person whatsoever, or of any charge or incumbrance affecting the same.] It hath been determined, that if a man deviseth his land to trustees to be turned into money, and that money laid out in a charity, it is not good within this statute ; for it is an interest arising out of land. So a devise of a mortgage, or of a term of years to a charity, is not good ; for the words of the statute are, that the lands shall not be conveyed or settled for any estate

estate or interest whatsoever, or any ways charged or incumbered in trust, or for the benefit of any charitable use: and by the third section, such gifts of lands, or of any estate or interest therein, or of any incumbrance affecting the same, are declared void. I have heard it questioned, that this is merely meant to confine a person from charging *his own* lands with a charitable legacy; but that a man may bequeath a mortgage made to him to secure a debt, to a charity: but it has been always held, that the devise of a mortgage passeth the lands so mortgaged, for the equity of redemption passeth to the mortgagee; thus all remedy is shut out from a charity, who could not foreclose, because it cannot take the right of foreclosure; and therefore the bequest of any real security to a charity, is in its nature void. But see the following decisions, on this subject.

Cro. Car. 37.
Atk. 605.
Bac. Abr. 83.
God. O.L. 477.

2 Vezey, 547.

I have been favoured with the two following cases in manuscript; but the first is more fully reported in 2 Vezey, 44.

Edw. Williams, the father of the testator hereafter named, having a mortgage in fee upon the lands of Oliver Jones, bequeathed the same to Wm. Edwards his son, and appointed him executor of his will. Wm. Edwards being the eldest son of his father Edw. Williams, and being entitled to this mortgage, both as heir and executor of his father, brought an ejectment against Oliver Jones for possession of the mortgaged premises, and recovered; and by an *Habere facias possessionem*, had the possession thereof delivered to him.

Mortgages, &c.
Atty. Gen. v.
Meyricke.

Wm. Edwards afterwards, on the 23d April 1744,
made

made his will, and amongst other things devised as follows: "I give, devise, leave, and bequeath all the
 " money in anywise due to me by mortgage, bonds, or
 " any other notes, specialty, or assumpsits on the estate of
 " Oliver Jones, whereof I am now possessed, by *Habere*
 " *facias possessionem*; and also all my personal estate of
 " what nature soever; to Robert Meyricke, and Thomas
 " Humfreys; in trust, that after payment of my debts,
 " legacies, and funeral expences, they, or the survivor
 " or his heirs, shall fix on a place in the parish of
 " Gwyddelwem, for schooling and teaching and cloth-
 " ing so many of the poor boys of the said parish, as the
 " interest of what money I am now possessed by virtue
 " of my securities upon the estate late of Oliver Jones,
 " will be able to maintain; and I direct that all the
 " money before-mentioned due to me from the estate of
 " Oliver Jones, to be laid out by them at interest, upon
 " good and sufficient security, and that the interest
 " thereof be employed in maintenance of the said
 " school for ever."

The testator afterwards died in possession of the mortgaged premises, without foreclosure.

This case came before the court upon an information brought by the Attorney General, for establishing this charity, and ordering the trustees to act in the trust.

The question was, Whether as is insisted by the next of kin to the testator, this devise to the charity, is a good devise within the statute of 9 Geo. II?

Master of the Rolls.—First, I shall inquire what right
 or

or interest passed by the will on its natural construction, without relation to this act of parliament: secondly, whether it comes within the act on account of the right which passes or otherwise.

1. As to the first question; the testator being heir and also executor of his father, to whom the mortgage was made, the legal estate descended upon him, and also the equitable. The testator then having devised all the money due to him by the said mortgage, &c. upon the estate of Oliver Jones, on the part of the relator it is said, that mortgages being considered in this court as personal estate, and the money is only devised, that the heir of the testator has the legal estate of the mortgage descending upon him, and shall be only a trustee for Meyricke and Humfreys, for the use of the charity.

But this distinction between a devise of the land, and of the money is without foundation. For if a man gives all his mortgages to A, all the interest the testator had in the mortgages passes, and the executor, if the mortgage was for years, and the heir, if in fee, would be trustees for A.— If this is the case on a general devise, it would be so when the words made use of are money on a mortgage.

This case was well compared to a devise of the rents and profits of land; by which words the land itself passes. So in *Laundy and Laundy*, Trin. 8 Geo. II. in B. R. by a devise of ground-rents, the land passes.— Further, the devise is to Meyricke and Humfreys, which must pass the legal inheritance, or if not the heir is a trustee.

trustee. Therefore I am of opinion, that this devise would pass all the right and interest.

2. Whether the *Mortmain* act has prohibited such devises? This depends on the reason of that law, and the construction of its several clauses.—The court ought to put such a construction on this act, being a remedial law, as will most effectually repel the mischief, and advance the remedy; and therefore, if by any means the mischief intended to be prevented by the act may happen, the act ought to be construed to prevent it.

I am of opinion, this devise comes both within the words, and also the plain intent of the act.

The intent was to prevent lands coming by any means into hands where they would be unalienable. Therefore the first prohibition is absolute as to real estates, but leaving men at liberty as to personal. The next circumscribes personal estate, and says, you shall not give money to be laid out in land. It goes further, money due on mortgage, affecting land, and the payment depending on the pleasure or ability of the mortgagor; the act has therefore provided the third clause to take in the very case of mortgages; and if it is not intended for mortgages, I do not know what it is intended for; and says, you shall not give that which is or may be a charge on lands. Suppose a sum devised, directed to be laid out on mortgage of lands, this is within the very words of the 2d clause. Is there any difference between this, and a mortgage in fee? I should think on the first clause, that mortgages are prohibited; but by the latter clause I am sure they are
on

on which I found my opinion ; which clause ought to have a liberal construction to prevent the mischief. For in the cases upon the 11th and 12th of Wm. III. against papists, it is observable, the court has made a liberal construction to prevent the mischief.*

The information was dismissed ; but this being a new case, without costs on either side.

In a subsequent case on this subject, Lord Chancellor Hardwicke thus delivered his opinion on the construction of this act. I never was so clear in my life, on the words and intent of an act.—The question is, whether a devise, in express words, of a *term for years* to a charity, be good, without the act ? I never will construe this act by a chicane, as the first statutes of *Mortmain* were construed : I shall consider it only on the preamble and the words of the act.

21 Nov. 1752.
Atty. Gen. v.
Greaves.

In the preamble, all the mischiefs are taken, though it ends only with *disseisin of heirs* ; but recites, that the practices are as common as advantages taken to impose upon persons languishing.

* On the authority of this decision, in a case in 1776, where there was a bequest of a general residue of personal estate to a charity, such as the executors should appoint, and great part of the personal estate consisting of mortgages ; Lord Bathurst held that the bequest was void as to those mortgages, and that the next of kin should have them as undisposed of ; but that the debts, &c. should be paid thereout, as being undisposed of : which last part was agreeable to a determination of Lord Hardwicke, in *Atty. Gen. v. Tomkins*.

*Atty. Gen. v.
Martin.*

The

The like mischiefs were intended to be prevented by this as by the former statutes. For the tenures were in view then, being the only support of the kingdom. But carry it on farther, when trade and commerce is intended, and then the locking up lands further increased the inconvenience. Therefore it is too narrow a construction to say, the preventing the disherison of heirs was only intended, which appears from the restraint of money to be laid out in lands, which lock up so much of the property of the kingdom; and this was the known view of the legislature.

As to the words; the first clause is the prohibiting clause, the next is the annihilating clause. I agree these clauses run together; but the last clause may explain the first, though not alter it. Question is, whether tenant for years is in the clauses, or to be confined to interest derived out of the donor's seisin of the inheritance. The authority cited to prove, that if the testator be possessed of a term for years, he may devise, is, that in the statute of wills the word *seized*, as in the case of Owen Buckingham, extends only to inheritance: (23d Car. II. of frauds.)

That tenements are only construed to mean real interest. But the reason is, because confined by the subsequent words deviseable; but the statute of wills or custom, and term for years, are not deviseable by the statute of wills, or custom of Kent; as in these words in Owen Buckingham's case, *Potestne legare cattalla velut terra*. They argued upon this act, that any estate or interest in the devise, shall not devise his own land, nor any estate or interest whatsoever. For as one
can

can devise a term for years, yet statute of frauds forbids, unless in the terms required by that statute. But compare the words, "money to be laid out in land," in the first clause, with the words of the annulling clause, which annuls all gifts or grants of interest out of lands or tenements, and which were intended to be correspondent with the first clause. There is the same reason to say, that the words "nor any sum or sums of money to be laid out," relates to laying out in lands his own personal estate in possession, and not his personal estate in others hands.

Can he give his personal estate to be laid out in terms for years? clearly not, for it would be absurd.

The words in the third clause, "interest out of lands," clearly intend this case.

The arguments upon the old statutes of *Mortmain* are the strongest reasons against construing this act as they were construed, and which shew the wisdom of this act.

The foundation and view of common recoveries, we read in the 2d Inst. were to avoid the *Mortmain* act.

This act is penned so, as to take in the provision of all the statutes of *Mortmain*.

The following is a very late decision on the principles already mentioned.

Hutchinson, possessed of real estate, and also a large
H personal

Bro. Cha. Rep.
271.

personal estate out upon mortgage; devised 7000l. to trustees after the death of his wife, to purchase lands in *Ireland*, the rents and profits to be distributed among his *poor relations* there, and in default of them, to *poor persons* in Antrim. His widow proved the will, and afterwards by her will reciting his, and that his personal estate was out upon mortgage in Norfolk, she ordered her real estate to be sold, and 7000l. to be paid to the uses declared in her husband's will.

Lord Loughborough, one of the Lord's commissioners, said, The bequest to the charity is good, *being to a charity in Ireland*, if it was not made otherwise by the circumstance of the money being upon mortgage on an estate *here*, which could not be liable to the devise to a charity; but it is too late to take that objection on the will of the wife, she admitting by the devise to the *same uses*, that she had personal estate of the testator; she is therefore paying a debt, not giving money that is upon mortgage, but only admitting that she had 7000l. personal estate from him; which as she was executrix and residuary legatee is admitting a debt to the estate. Although the court will not marshal assets for a charity, yet it will make the legatees go upon the mortgage: The charitable legacy was directed to be paid.

Rent charge.

It is just the same as to the devise of a *rent-charge* on lands; this is to secure a sum lent, or due and owing, for which such *real security* has been given:—It is an interest arising out of lands, and an incumbrance affecting lands, and it is also a real security, giving such real remedy by distress and re-entry on non-payment, and, in many such grants, a power of actual sale to recover the principle and

and arrears, which no one can take who is not inheritable; and therefore a charity is precluded. And if the heir at law, or executors, made no objection to the devise, and transferred their claim to the charity, which thereby came into the annual receipt of the payments reserved (or in the former case, of the interest arising upon the mortgage) and the other annuitants, were desirous of selling; although a general court of the governors of the charity should authorize their treasurer, or the trustee to whom the rent-charge was devised, to join in such sale (a power which it is very doubtful whether they are able to delegate under the idea of a conversion or misemployment, or the altering the terms of the donor's gift), yet they could not make out a legal title to a purchaser, so as to indemnify him against the future claims either of the heir at law, or of any future visitor to reform the charity: and the very words of their conveyance would clash with the strict prohibition in the statute, as the premises to be conveyed could bear no other description than a charge or incumbrance affecting lands, or an estate or interest therein.

See 1 P. Wms.
222.
43 Eliz.

But an annuity is very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burden imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore if a man, by deed or bond, grant to another 20l. per annum, without expressing out of what lands it shall issue, no land at all shall be charged therewith; and yet a man may have a real estate in it, though his security is merely personal; the remedy in case of non-payment is to sue upon the bond, which in case of judgment either against the

Annuity.
2 Bl. Com. 40.
Co. Lit. 144. 2.

P.Wms. 423.

Erecting and
Building,
Gastil v.
Baker, 1747.
cited in 2 *Vezev*,
185.

obligor or his heirs, extends to his lands, and this renders it a real security affecting lands: but a mere annuity may be granted or bequeathed to a charity, and is not within the statutes of *Mortmain*, and the executors will be bound to provide for it out of the personal assets received: but in case there should not be sufficient assets, after payment of the debts, to discharge the other legacies, and invest a capital sufficient to produce the annuity, all the legatees, with the charity also, must proportionably abate; for though charities are preferred by the civil law, yet they ought to abate, for they are but legatees.

Erecting and building are often joined, though the former expression is used in a legal sense more as synonymous with *creating* or founding; as where a testator gave "all the rest and residue of his estate of what nature soever to trustees, in order to and towards erecting a school for the education of poor boys, in such place, and in such a manner as the trustees should direct and appoint."—It was insisted that this was a lapsed legacy by the *Mortmain* act; and that erecting a school must mean *buying and building*.—But Lord Chancellor Hardwicke said, that *erecting* included the *founding*, and consequently the maintenance of the master; which was a different thing from the mere school place itself; but the end might be obtained by hiring a house, and that for ever; and directed accordingly.

2 *Vezev*, 182.
Vaughan and
Farrer.

And a similar determination grounded on the same principles was afterwards made in 1751; where Allen the testator had devised the residue of his real and personal estate in remainder to trustees, to erect in or near
York,

York, an *hospital* for the support and maintenance of as many poor old men as the surplus of his estate and effects would admit of, and to put in as many as they should think proper in their discretion: and Lord Chancellor Hardwicke said, The remainder over of the real to the charity is void; which is given up; and, consequently, whenever the death of devisee for life without children living at the time of her death happens, the reversion in fee will take place in the plaintiff; (*heir at law and next of kin.*) But as to the residue of the personal, I am of opinion, the charity must be supported; and that it is not contrary to the true intent, meaning, and construction of 9 Geo. II. As to the point of the mortgage; if that objection was to hold, it would be very fatal. *Atty. Gen. v. Meyricke*, is very different: there was a specifick legacy of the whole personal estate, not given by way of residue; and the mortgage particularly by name, which the trustees particularly claimed; and it seems (for I do not enter into the point now) agreeable to that case of papists, who are not capable of taking a mortgage. Here is no part of the personal estate given specifically; nothing but the residue which will remain after payment of the debts, funeral expences, and legacies; which may exhaust the whole of these mortgages, supposing any such; which does not appear: so that it cannot now be said, that there will be one shilling of the money arising on the mortgage applicable to this charity; *residue* implying nothing specifick, only the balance of an account after debts, &c. which is not yet known until administered by the executors, in whom the whole residue vests: or the executors may turn the mortgage into money, and the trustees can pray nothing against them but the balance of an account,

count. The other way of construing this residue would be much too large, and make these bequests so uncertain, that the act of parliament might be as well made, that no personal estate shall be given. The question then comes on the construction of the bequest in general; to which it is objected for the plaintiff, that this residue is given in fact to be applied in purchase of land, or part of it at least, contrary to the statute; that the court would not have made another construction before the statute, and consequently ought not now: but I am of opinion, this was not then, nor is now, a necessary construction. As to the construction of this clause, it comes very near to the case of a school: for a school imports there should be some place, in which the children shall be taught; for it cannot mean, it should be *sub dio*. So does an *hospital* import some place, in which these people should be entertained. There is no direction in this will, that any part of this money should be laid out in *building* an hospital; for *erect*, as well imports *foundation* as building: and therefore it was so construed in the case of the school: and so is *erigimus* construed in charters of the crown, and private foundations. It is said if this case had come before the court, before the making this statute, the court would have directed part to be laid out in land and building on it, and part in land for endowment and maintenance thereof; perhaps it would be so; it is therefore inferred, the court cannot make a different construction to evade the statute: and for that, a case was cited (*Mogg v. Hodges*), where the court was not warranted to make an alteration in marshalling assets to evade this statute. The court cannot lay down a different rule of law or equity in respect of the rights of the parties, to take a case out
of

of the provision of this statute ; but that is a very different thing from the manner of executing a charity. The carrying the directions of a will for performance of a charity into execution is different from the other. Now before this statute it would be in the pleasure of the court, to have directed this money to be laid out in land or personal securities, the funds ; and the court did then frequently direct to lay out money, given to a perpetual charity, in the funds, and not in lands, where the will did not direct to be laid out in land ; as this does not. Sir J. Jekyl has done it ; for he took it to be in the discretion of the court : and the court has done it since in the case of money given or collected in a person's life to a charity ; which there is no restraint in this statute from laying out in land : notwithstanding that the court sees, this goes so near to the mischief intended to be remedied by the statute, that the court will not direct it to be laid out in land, but in the funds ; and I believe on that ground, though by this statute it was lawful to do it, yet, as it was contrary to the tenor of it, I varied a direction given by *Sir Wm. Fortescue*, late *Master of the Rolls*. As therefore this will has not given direction for laying out this in land, before the statute it would be in the power of the court to direct it either way, and since the statute to direct it one way, the funds, the court ought to do so ; for there is nothing in this statute prohibiting the giving personal estate to charity, provided it is not to be laid out in land ; and the words of the statute are applied to improvident alienations to disinherit of heirs. If a large personal estate is left to trustees for a charitable use, which they direct, and there is no occasion to come to a court of equity for direction, there is nothing in this statute restraining the trustees from laying out that in

land; because by the express proviso, all purchases to take effect in possession are good, notwithstanding this act of parliament; which is a matter may perhaps want a remedy. If indeed these trustees were to come to this court for an establishment, the court would never direct it to be so laid out in land; but there is nothing illegal disabling the trustees from privately doing it, because the statute makes good all purchases, &c. (to take effect immediately in possession.) But it is said two purposes are to be answered; one, the *erection*, the other, the *maintenance* of the persons; and that supposing the court should take it in the latitude it now does, as to the endowment and provision for the poor, that may be answered by putting it out on the funds; yet the hospital cannot be without a building; that land should be bought for that; and the plaintiff ought to have the benefit of so much as the master should think the value. I wish I could come at that, for this plaintiff; who is as much, or more perhaps, an object of charity, than any of these people, who may come into this hospital. It is unfortunate; but yet the court must go according to such rules as will hold in other cases. Suppose this happened before the statute, would it have been of necessity any part of this money should be laid out in land to build an hospital? If the trustees had come before the court and laid a scheme, that a certain person would give a piece of ground to build this upon, it might be done; the court would have accepted it; or if they had said, there were in York several charitable foundations, belonging to the city, and they would let them build thereon for this hospital; the court would undoubtedly have accepted it. Nay, they might have said, they would take a house in York for that purpose:

there

there is nothing in this statute restraining the giving money to build. It is lawful notwithstanding to give money to build a church. Suppose the universities had stood under the same disability, as is laid on other charities; money might notwithstanding be given to erect a chapel or hall, or add a building to a college. That is to be executed at once; it locks up no more land; one may give money to add to the buildings of any hospital in London. Nothing therefore in this statute restrains the testator from doing what he has done with his personal estate: it is a mere surplus of personal estate given to (what the court construed) founding an hospital; in the foundation of which the trustees cannot under direction of this court lay out in purchase of land, but may by hiring a house in York, or by permission in building on a common piece of ground, belonging to the city; which is for the benefit of the city. The act meant to leave persons to dispose of personal estate for a perpetual charity: but meant to prevent the great mischief of giving land for that (purpose), or money to be laid out in land; as that would lock up land from being used in a commercial way; which would be a detriment to the public.

The bill was dismissed, but without costs. His Lordship observed, that the legal estate is made void by the act, which operates like the popery acts.

Wm. Bowles by will, in 1745, bequeathed 500l. out of his personal estate, to trustees, to be laid out, part in erecting a small school-house, and a little house adjoining for the master; the whole purchase and building not to exceed 200l. and the remaining 300l. to be laid out in

Atty. Genl. v.
Bowles, 1754.
3 Atk. 806.
2 Vezey, 547.

in the *purchase of land*, or in some *real security*, for the *maintenance of the master*.

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Lord Hardwicke held, that the word *real*, must be taken in its known legal signification; therefore *that* 300*l.* legacy was void within the statute. But as to the 200*l.* if they could get a piece of ground by the gift or generosity of any person, *not by purchase*, they might be at liberty to apply to the court, to lay out *that* 200*l.* in *erecting* a school-house thereon, when the trustees could lay a proposal before the court; *but not to be laid out in land to build upon*: and the proposal to be given in a certain time.

Thus, money might be bequeathed to build, but not to purchase the ground, which the trustees were authorized by implication to hire; but the principles of these two decisions were afterwards examined by Lord Chancellor Henley, in 1764, in the case of *Atty. Genl. v. Tindal* already mentioned; which came before him on appeal from the rolls: the case I believe is not reported in any of the books, but I am enabled to lay it before the reader by the same able friend, whose kindness I have before and am always desirous of acknowledging, who has favoured me with his notes taken in court at the time.

*Attorney
Genl. v. Tindal
in 1764 before
Lord Chancellor
Hardwicke.
J. C. Ambl.
614.*

In 1754, Mary Packer devised all her messuages, &c. whereof she was seized in fee, and all her leases, &c. to Jarritt Smith, and others, in trust to sell the same, and with the produce thereof to purchase ground for building and furnishing an alms-house, not exceeding the sum of 1400*l.* and to lay out the remainder in the purchase of lands; and out of the rents and profits thereof to pay 20
poor

poor persons a weekly allowance ; and till such purchase should be made, the money to be placed out at interest ; and the dividends to be applied in accumulating the capital. And if her intention as expressed could not take effect by law, then she gave the purchase-money to the trustees, for the same charitable purposes as near as can be ; and as the law would admit of :—And gave all the residue of her personal estate, to the trustees to be disposed of to the aforesaid charities.

By the decree in 1759, at the Rolls, the devise of the freehold and leasehold was declared void, and an account of the personal estate directed. The master made his report, and on 24th June, 1761, an order was made, on a hearing for further directions ; when it was declared, that if they could obtain a piece of ground by gift, the mere personal legacy would be good : And the debts to be paid out of the leasehold estates, &c. and also the legacies and costs.

From hence an appeal was taken, and the question arose as to the leasehold and personal estate : Whether the specifick bequest to the trustees, being declared void, it could pass by the residue ? This it was held would be absurd ; as it cannot pass directly when given as leasehold ; and inconsistent. See the manner of directing this by the decree.

Where there is no double fund, there can be no marshalling of assets : here it would be making it to be the charity.

Atty. Genl. v. Bowles, was on the same principles ;
money

money given to build a school, and to buy land and endow ; the money to purchase was void, but the money to build good, if they could get a gift of land within two years.—This would go so far.

His Lordship said he could only go according to the house of lords, having no other precedent to guide him : that he was of another opinion, though the person who made that decision (Lord Hardwicke) was as little liable to err, as any one. It is laying out money in lands, in the court's sense of it ; it is converted into realty ; is demandable in a writ of right, and amortizes so much property. It would leave open a door for every ostentatious weak person, who was fond of a name : the object is vanity, is a remnant of popery, which ought to be extinguished where the best religion in the world is exercised.

If the *Atty. Genl. v. Bowles*, could be supported ; this is much stronger ; because the intent is here, that the charity should be entire ; she directs (which was not in *Bowles*) the scite to be bought with her money : therefore it would be deserting the will to establish an illegal act ; by this narrow judgment this act would be like all other *Mortmain* acts.

The act is clear, not to give lands for charity ; nor to realize money for charity : surely it will if land worth only 50l. become worth 40,000l.

As to the residue of the personal estate, his Lordship held it void ; as it appears intended to be laid out in land, &c.

It

It did not appear to him on what ground this part of the decree was founded : by the will, it appears to be intended to be laid out in land. There can be no doubt, but that if the will had been made before the statute, on a bill it would have been directed to be laid out in land.

In *Soresby v. Hollins*, and *Grimmett v. Grimmett*, the devises are disjunctive in lands *or* money, or to the satisfaction of the trustees : But here, it is given absolutely to be laid out in lands, and who can alter it ? Suppose the money to be laid out in lands, and till a purchase *can* be made, to be at interest (and not to accumulate for ever, as here) ; may it not be said, the trustees shall decline to lay it out in land, and so avoid the law ? This is not good, for the original intent is to have land : but it would have been good if an election had been originally given of land or money.

The latter clause in the will his Lordship held was void, collusive and fraudulent ; and not to be considered in cases of this kind : it is meant to defeat the act : it intimidates the heir and next of kin from putting the act in execution.

His Lordship said, he extremely approved the policy of the act, and extremely disapproved antilegislative charities :—It was against reason to defeat whole families. It was his duty to support the spirit of it fairly, without chicanery ; he had gone further than any one, and that had not yet been complained of. In *Salisbury v. Edwards*, he said, he prevented a contrivance to hinder the heir from contesting the will.

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The decree was reversed, except as to costs and accounts, and the personal estate directed to be distributed among the next of kin.

It was said generally, by the Chancellor and the counsel, that assets might be marshalled for a *gross* legacy to a charity, but not for a *residue*: and Lord Hardwicke in *Atty. Gen. v. Greaves* had made that distinction; and declared, *that* case should not be a precedent for a *residue*.

Misnaming and
Uncertainty.

2 Vezey, 426.

The *misnaming* and *uncertainty* of expression in a bequest to a charity, has been always guarded by the court, as may appear by the statute 14 Eliz. c. 14. and by the following decisions. But it may be proper to observe here, that the usual course of application to the court to establish charities, is by bill of information in the name of the *Attorney General*; and though there should be any mistake in the circumstance of laying it, yet if it appears there is a charity, and the right appears in the whole cause, that information cannot be dismissed, but a decree must be made to establish that charity. This doctrine has been frequently laid down, and allowed; because it is considered as a proceeding by an officer of the crown; and as the king is *pater patriæ*, the information therefore must not be dismissed: so that though the relator has mistaken his title, but however in the cause a title comes out for him and his successors, he must have that title established. To proceed:

Swinb. p. 7.
f. 8.

A testator bequeathed 100l. "*to the church,*" not mentioning what church; it was held, that it should be understood of his *parish church*; or if he name a church, and there be several of the same name, and none of them his parish church; the executor, if he prove the will,

will, or the ordinary, if he refuseth, may bestow the legacy on which church he pleases; but if the testator's parish church be of the same name, it ought then to be bestowed there.

The Court of Chancery will not suffer any agreement between the heir and the charity to alter the donor's design; and will decree the charity generally as near as can be to the intent of the donor; and therefore, if the gift is of money to the parish of B generally, it shall be decreed to the poor; if he had given it to the *poor of the parish* indefinitely, this would, according to the civil law, be to the poor of the place or parish where he lived, if there was no hospital there; but if there was, then to the poor of that hospital; and the court of chancery concurred in so decreeing it. But a legacy to the *poor* indefinitely, was afterwards said to include all the *poor of England*; and therefore was vested in the crown, who disposed of it to Christ's hospital and others.

Finch, 222.
Atty. Genl. v. Platt.

2 Dom. Civil
Law. 169.

Finch, 245.
Atty. Genl. v. Peacock.

Again; If the gift is for the poor of any city, and other parishes are afterwards admitted within the precincts of the city, and added thereto; the poor of the parishes admitted, shall have a proportion of the charity.

Finch, 194.
Atty. v. Corp. Rochester.

On the same principle the court decreed in *Masters v. Masters*, that where a legacy of 5l. was bequeathed to the poor of two hospitals in Canterbury, naming them, and by a codicil an annuity of 5l. to *all and every the hospitals*; it appearing that the testatrix lived at Canterbury for many years, and died there; and that she had taken notice by her will of two Canterbury hospitals; this charity was held not to be void for its incertainty, but

1 P. Wms. 425.

but to have been intended for *all the hospitals* in Canterbury; but not to extend, as was pressed, to the hospital about a mile out of Canterbury, though founded by the same Archbishop, and governed by the same statutes. And this the court decreed, notwithstanding it was objected, that they ought not to go out of the words of the will, and confine the general words "all hospitals," to those in Canterbury; and the court did this the rather, because these charities if they prevailed would be perpetuities of 5l. per annum, and by that means create a deficiency, and consequently in a great part defeat the rest of the will as to plain legacies, in favour of those that were doubtful.

It is however to be remarked that this decision was some years previous to the late *Mortmain* act, and the annuities granted were charged on the testatrix's lands, which could not be at this day; but the principles of the decision as to the expression of uncertainty whether all or what hospitals were meant, remain still the same.

1 P. Wms. 674.

Atty. v. Hudson.

Thus also, one Penning, of Saffron Walden, in Essex, and several others subscribed to a charity school there, of 12 boys and girls, which subscription was only during the pleasure of the benefactors. Penning, delighted with seeing these charity children, declared he would leave them something at his death: there was also a free school in the same town; and Penning made his will giving "500l. to the charity school," and several pecuniary legacies to his poor relations, and died. The executors insisted on the want of assets. Lord Chancellor Parker said, that, though the free-school be a *charity school*, yet the charity school for boys and girls went
more

more commonly by that name; and as the testator was fond of the *latter*, and declared he would leave them a legacy, therefore *that*, and not the free-school was intitled thereto; and ordered the legacy to be brought into court with interest from the end of the year after the testator's death: and in case of a deficiency of assets, that all the pecuniary legacies, as well that to the charity as others, should abate in proportion; for though the Romans preferred a pious or charitable legacy to others, yet our law does not: they being all but legacies, and equally intended by the testator to be paid, it would be hard that one of them, by being preferred, should frustrate all the rest; besides the other legacies being to several of the testator's *poor relations, they are charities* also.* And because it was objected, that on the failing of the charity school, the charity ought to revert to the founder, therefore in such case his Lordship gave liberty to the parties to apply again to the court.

Ante.
1 Vern. 230.
2 P. Wms. 25.
1 P. Wms. 423.

The same principle is evident in the decision on the case of Caroon-house at Lambeth.

Noel Lord Caroon, formerly ambassador here from the States General, being seized in fee of a great house in Lambeth, called Caroon-house; and the lands thereto belonging called the *Park*, and having built an *Alms-*

Finch, 353.

* But where a testator, among other bequests to charities, gave 3l. a piece to the poor of three several parishes, the court looked upon them as part of the funeral, and as *doles* at the funeral, and therefore held that no abatement ought to be made out of them; Atty. Gen. v. Robins. 2 P. Wms. 25.

I

house

house in that parish, wherein he placed *seven poor women of Lambeth, of sixty years of age and upwards*, whilst he lived, and appointed 4*l.* to be yearly paid to them quarterly; and, to establish the same as a *perpetual charity*, did by his will charge the premises with 28*l.* per annum, to be distributed equally to *seven poor women*; and directed that when one or more of them died, their places should be supplied, at the appointment of the owners of *Caroon-house*, by *other poor women*, which, as it was suggested, he intended should be *poor women of that parish*; which was always done by himself as long as he lived: and it appeared, that the owners of *Caroon-house* had for some time paid the charity, but of late had refused, so that it became in arrear, neither did they fill up the vacant places, pretending that the charity was not payable in *succession*, there being no such direction in the will of the donor, but only to *seven poor women* who were in possession at his death; or that if it must be paid, yet it might be to other poor women out of any other parish at their own appointment.

And therefore this bill was brought against the owners of *Caroon-house*, to have the charity established for ever, and the arrears thereof paid by the defendants, and the growing payments duly made for the time to come, and the poor women to be chosen in *succession out of Lambeth* only, and not out of any other parish: for otherwise the charity would rather be a prejudice than a kindness to *Lambeth*; because if taken out of other parishes, *Lambeth* must maintain them, the 4*l.* per annum being not sufficient to maintain a poor woman of *sixty years old*. It was decreed as prayed, and thus a charity was established
in

CHARITABLE USES. 115

in the hands of the church wardens *in succession*, though not given so in direct words.*

A man bequeathed a sum of money to be distributed every year on certain days to the poor of the parish of L. in the county of M. and there was no such parish in M. but there was in the county of D; the court established the will, because it appeared that he was born there, and that both he and his parents lived and died there.

Finch, 395.
Owen v. Bean.

A question has been made with some air of importance, whether the title of *governors* is a proper legal description, so as to intitle the charity to a legacy left "to the governors thereof?" It is certain, this term seems to constitute them into a society, when perhaps they are not incorporated by the franchises of a charter: but there can be no danger in wording a bequest in this manner, for it speaks the testator's intention clearly enough; and though the court might be inclined to favour the heir at law with a preference, in case he had not been sufficiently noticed by the will, yet we have seen how uniformly it has made it a rule of decision to favour charitable bequests on the slightest description: but for the sake of caution against litigation, it may not be unseasonable, always to adhere to the mode recommended by the charities themselves, of bequeathing "to the treasurer for the use of the charity."

* Though this devise would be void if made since the late act, yet it is here cited to shew the uniform practice of the court in such cases, of rectifying general or doubtful expressions in wills.

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Evidence.

It is worthy of notice that parishioners are not good evidence to prove a charity given to their parish, because they are interested, as, being eased in the poor rates.

Doe ex dem.
Hindson v.
Kerry.

I have been favoured with a very copious minute of a case where this question, of the credibility of evidence, was fully discussed, and the following is abstracted from the arguments of Lord Camden, on that occasion.

The case is this: Testator devises certain lands to trustees to be applied to the use of such poor, as by reason of infancy, impotence, or old age, are unable to work, and to place out the children of such poor, apprentices; and declares that the rents shall be applied to no other use or purpose.—Three witnesses who attested the will are seized of lands in fee within the same parish at the time of attestation.

The objection is, that these witnesses cannot be admitted to prove the will in court while they remain so seized; because by the establishment of the will, they will derive an interest to themselves, in respect of those lands.

Their interest is this; that as the poor's rate must be reduced in proportion to the value of this benefaction, their estates will become rate free *pro tanto* for ever.

Although the devise, at the time of the testator's death, was future, and did not take effect till 1756, four years after; yet it was a present benefit to the owners of those lands, and made them immediately more valuable, in consideration of this future easement.

First,

First, it was said, that the poor here described, must be understood to be a class of poor, just above the necessity of relief, and that this charity may be applied by the trustees to the use of such persons, exclusive of the parish poor. To which I answer; that the poor in this will, are those who labour under the extremest wretchedness of helpless poverty: for, when it is considered, that the day labourer, who only lives from hand to mouth, is deemed by the testator to be a person above the want of this charity, which is confined to the impotent only, those who have enough to subsist on without labour, must *a fortiori* be excluded.

2. The poor in this will are denoted by the same description, as the parochial poor are by 43d Eliz:—And if this be so, this charity cannot, by the terms of it, be distributed to a set of men, who are excluded by the will; it will be a breach of trust to do it; and if it be said, that the Court of Chancery can direct the money to be applied to a superior order of poor, I desire a case may be produced where this court has ever made such a decree.

If a legacy has been given to poor house-keepers, and poor not receiving alms, or to poor in general, there might perhaps be some ground for that distinction. But I can never believe, that the court could make such a decree in this case, the business of this court being to expound wills, and not to make them.

And whereas, it is said that these legacies, when they reduce the rate, come to be, in their operation, legacies to the rich, and not to the poor:

*Assemble
A22.*

I answer, that it is impossible to be otherwise ; and though this is always supposed to be contrary to the testator's intention, no man living can be sure of that, and I do much doubt it ; for why may not a man mean, at the same time, to give it to the poor, and likewise ease the parish ? The poor's rate is a most heavy burden ; it falls upon the tenant, and occupier, and is paid by those who are not above a degree or two richer, than the object he is forced to relieve ; so that he who so disposes of his estate is a double benefactor.

But be this as it will, If a gift is made to the parochial poor, it must reduce the rate *ex necessitate*, though the testator may possibly intend otherwise.

My brother Gould contends in the next place, with whom my two other brothers now concur ; That this benefaction should not be considered as an estate to the parish, but as a bounty to be added to the parish relief, for the comfort of the poor, and not for their subsistence,

By the 43d *Eliz.* the parish are only taxable for the necessary relief of the poor ; nothing therefore but necessity, can call for this relief. If the party can subsist by any means whatsoever, without this aid, he is not the object of this law ; nor can it ever be material to consider from whence the pauper is supplied ; if he has wherewithal to subsist without the parish, the parish must be discharged, because the relief in such case is not necessary :—And as the necessity of the object, is the rule by which the relief is to be proportioned ; it must be more or less according to the pauper's condition and circumstances,

If a labourer who earns seven shillings a week, by his industry, is incumbered with a large impotent family, the parish adds so much to his weekly gains, and no more than will be just enough to keep the family alive; if he falls sick, the allowance is increased; if his children die, or become useful, it is diminished: One has a little close worth 40s. a year; his stipend will be less than his neighbour's, who has but 2s. a year; and he again will be less considered than another who has nothing.— This is the true reason, why the rate is directed to be made weekly, or otherwise, because the state of the poor is always fluctuating.

An estate or legacy is given to the poor; if in this case the rate must continue the same without any regard to the benefaction, you call upon the parish for a superfluity: for as far as the rate added to the charity, will exceed the sum necessary for their subsistence, the parish is taxed just so far beyond the sum necessary for their relief; and so contrary to the act of parliament; for relief and subsistence are synonymous terms.

This duty upon the parish is so connected with the necessity of the pauper, that if a testator bequeathing a legacy to the poor, should say; "I mean that the poor shall enjoy the same parish allowance, over and above my legacy," the clause would be *felo de se* and void; unless it can be maintained that he who has something, is as poor as when he hath nothing. For if he is richer, he wants less relief; and if less relief, a lower rate will do; so that if the legacy takes place, the parish must of necessity be eased.

I have been arguing upon an allowance of money:—Suppose a testator bequeaths a legacy to clothe the poor, or a house to receive them, or a sum to prentice out children:—Must the parish clothe, lodge, and bind out as they did before? Or must they add the value of the clothing, house, &c. to the former allowance, and so give the poor a superfluity above their necessary subsistence? I think that cannot be contended: and yet a gift of a house, or clothing, is as much a bounty to this purpose as a gift of money.

If I suppose in arguing, which I have a right to do, that the charity is amply sufficient to maintain all the poor, Gould, J. does not own, nor does he choose to deny that the parish, in this case, must be eased; but if it is only a trifle, it is a bounty. According to what I have said, let it be ever so small, it must operate *pro tanto*.

Nor can there be any difference between a devise to trustees, and a devise to overseers: the trust is the same in both, and the objects the same; and the parish officers are but trustees: as the trustees in the application of the charity are parish officers, the hands through which the charity passeth, are, in both cases, mere instruments.

As often as this question has come before the court, in the cases of penalties given by parliament to the poor of the parish, the court has constantly held, that the rate would be reduced by those sums, and every parishioner eased *pro tanto*: yet those are gifts, why not bounties, in many cases more inconsiderable than the present; upon the whole this idea of a bounty is nouvelle at the bench.

Charity

Charity was given by will to clothe six poor persons of Enfield, in Middlesex:

1 P. Wms. 600.
Atty. Gen. v.
Wybourg.
Reported very
shortly.

Lord Chancellor Macclesfield would not suffer any of the inhabitants of that parish to be witnesses, because they were interested as being eased in the poor's rate; and though it was urged, that they might be lodgers there, or persons not contributing to the rate, and that it was incumbent on those who took the exception to make out the contrary; yet the court said, the witness being described to be "of the parish of Enfield, yeoman" must be intended an house-keeper, and one liable to pay parish rates, unless the contrary be made appear.

But his Lordship went further into the subject, than is reported in 1 P. W. and argued as follows:

What can be said on the last use of this will, to bind out poor children, apprentices? Here the parish must be eased, unless they will choose to pay the master double the value. To proceed to the remaining difficulties:

The interest is nothing claimed under the will; it is nothing in present, it is contingent in future; it is minute.

To the first; it is not given to the parishioners, but it is an interest derived to the parishioner, in consequence of the will; the common case of penalties given to the poor; he gains if the will is established; he loses, if it is set aside.

To

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To the next, it is no easement, *in presenti*, I admit; but in respect of future easement, it is even now a present, and a lasting benefit; and in truth, which will answer the next objection at the same time, all future interests, where certain or contingent, whether now or hereafter to be enjoyed, are present benefits, have a price, and are saleable.

The Court of Chancery therefore have very sensibly pronounced possibilities, to be vested interests, and made them transmissible; a fee expectant upon a thousand years term, has been sold for money: let me put the case of an executory devise of an estate of 10000l. a year, and the life before in a deep consumption; I am entitled to put the strongest case I please; could this devisee be a competent witness to prove the will? The answer must be, he could not; tell me then, what chances are valuable, and what not; till this line is drawn, I must insist, that all chances are valuable.

Hence if it should be said, that perhaps the parish may have no poor; I admit the supposition to be possible, and barely so; but if it be only as possible that they may be burdened with poor, every estate that is discharged from this possible burden, is in that respect bettered, and must remain so, as long as the statute of 43d Eliz. stands unrepealed.

As to the objection, that the interest is too minute; and that a small interest, as in *Townsend's case*, ought not to disqualify witnesses:—I do conceive that however that point may have been litigated formerly, yet that
now

now the law is clearly settled, and the witness must be rejected if he has any interest, be it ever so small.

The point was disputed for above 20 years, in the case of toll, or custom, claimed by the city of London upon importation, called by the name of *Water Bailage*.

The question was, whether freemen might be witnesses? Nothing can be more minute, than such an interest; and yet after many opinions, *pro* and *con*, it was finally settled that they were not witnesses.—Any person who has a mind to trace the history of this question, may find it in 2 Keb. 295. 3 Keb. 2 Len. 231. 2 Show, 47, 146. 1 Vent. 351. Vern. 254, 318. 11 Mod. 225. 1 Vern. 254.—Stat 1 Ann. c. 10. is material for this purpose; for that act lets in the evidence of the inhabitants of counties, &c. in all informations and indictments for not repairing highways and bridges. So again, the parishioner is admitted for suits, to recover money mispent by parish officers. Which shew, that the rule to reject witnesses for minute interest, could not be broken in upon, by less authority than an act of parliament.

An inhabitant receiving alms is no witness, Viner, Cha. anno 1737.

True it is that the interest of the witnesses in some cases is drawn so fine, that it is scarce perceptible, and yet that glimmering, that scintilla, shall be as powerful to exclude the witness, as the most substantial profit; and I have always understood that case to be good law,
where

where the court set aside the witness, because he thought himself bound in honour to pay the costs of the suit.

The true ground whereof is this, which is fit to be attended to in every part of this branch of the argument, that as no positive law is able to define *that quantity* of interest, which shall have no influence upon the minds of men, it is better to have the rule inflexible, than permit it to be bent by the discretion of the judge.

The discretion of the judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper, and passion; in the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable!

As to the point, how far this interest is releasable; It is neither so, within the intention of the act, nor in its own nature.

1 Interest releasable must be something out of the testator's estate; which this is not.

2 It must be given to the witness by the testator; which this is not.

Therefore is not the subject which meddles with bequests made by testator of his own estate to his own legatees.

Lastly, not a releasable thing in its own nature: It is an easement, an *onus* extinguished.

If

If it is to exist, it must be revived: the release will do that; nothing but rights can be released.

How shall this be drawn, and who shall be the relesee? Devisee, or heir at law, or parish officers? Does it pass any thing? No: does it operate any thing? No: absurdity!

If it be said, it may be renounced, and that is the same thing; I answer, the act has used the word *release*. And yet I do not well see, how a man can renounce the discharge of a burden; if he who is intitled to the profit of it, will not claim it, or enjoy it. I see no other way of restoring such a tax to the parish, but by a new grant.

The case was sent to the master, to inquire whether the lands were liable to the charity.

It is the practice in all causes, where a corporation is a party, to disfranchise a free member before he can be admitted to give evidence:—But as the governor of a charity comes in by virtue of his donation, or as executor to some donor deceased, and will be deemed as much interested for the good of his charity, as a free brother can be for his own company or city; and as he can never be divested therefrom, but by his receiving back his donation, which all the governors together have not power to order, for they are accountable to the public, and cannot as was said before make themselves founders; there is no method of rendering a governor's evidence in behalf of his own charity admissible, if excepted to.

I mean this as a caution to friends in attesting wills containing

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containing donations to a charity; if such donation should afterwards come into litigation, the subscribing witness being a governor of the same charity, is not competent evidence to prove the will in favour of the charity.*

Interest.
Duke, 141.

It was formerly held unsafe to bequeath money to be put out at interest, and the interest to be given to the poor; for this was not deemed a charitable use, because it depended on usury, which is unlawful. But at present, there being no restraint in the late act, to render a bequest void, that directs a sum to be laid out in the funds for the benefit of a charity, it seems that former principle is altered; for this, though a security for money, yet is not a real security, which has been decided to come within the meaning and spirit of the statute;

2 Vezey, 547.

25 Geo. 2. c. 6.

* The act of Geo. II. makes void a legacy or devise left to a subscribing witness, and so admits his evidence: But a creditor whose debt the testator has charged upon his lands by his will, may be a witness thereto. A devisee or legatee if paid, and hath released the executors, or hath refused to accept his legacy or tender, may be admitted evidence to prove the will; but after such refusal is for ever barred therefrom:—And if he hath received his legacy, he may retain it, notwithstanding the will should afterwards be adjudged void for want of due execution: and no person whose legacy shall become void in any of these cases, or shall be examined as an evidence to prove the will, shall ever after take the same, or the profits thereof, from any person by any compensation, colour or pretence whatsoever. Exception in favour of an heir at law or devisee of lands under a prior will, and whereof he hath been in quiet possession two years; or under a contested will before 1751, the possession of an heir at law until a future or executory devise excepted.

and

and the following case may serve as a full explanation of this rule.

In the town of *Stafford* various sums had been given to the corporation to be lent out to the poorer sort of the inhabitants at 5l. or 10l. at a time; some at full interest, some at half interest, and some without interest. The whole sum lent out was 590l. The corporation fearing they might lose it by pursuing this method, thought proper, in 1714, to call in as much as they could, and then there was a deficiency of 140l: the rest continued in their hands for some years. To make up the whole sum of 590l. they were advised to put out what they had gathered in, to good security till the interest should have accumulated it to that amount (which was made up in 1725), and then in order that the poor inhabitants should reap the benefit, they were advised to lend the whole on good security, and divide the interest among the poor inhabitants, as they should think proper: they followed this method, and distributed 21l. part of the interest among 42 of the poor inhabitants, at 10s. per head:—Under a commission for charitable uses, they were compelled to lend out the whole again in small parts agreeable to the bequest, and the corporation to pay the costs of the commission; they took exceptions to this decree, which were never argued, they agreeing to pay the prosecutor out of the 590l. in their hands, 90l. for his costs, and so he consented that the decree should be reversed.

Atty. Gen. vs
Corporation of
Stafford.
Barn. Ca. Cha.
33.

The present information was filed, praying for interest as long as the money remained in the hands of the corporation, and to have other trustees appointed.

The

The following was the substance of Lord Chancellor Hardwicke's decree. That some part of the money was to be lent without interest, other parts with half interest, and other parts at full interest. The first of these is a good charity, in that it is a means of encouragement to set the poor on work; the second of these is good in proportion; but how it is a charity to lend money to the poor at full interest, he could not find.—At first the corporation complied with the trusts.—And considering the money was to be lent to the poor in such small sums, it is no wonder there was a loss; and if the whole had been lost in that way, the corporation would not have been answerable.—As to the method they took to make up the deficiency, he did not know that a better method could be taken. But from the time they made up the whole, they kept the money in their own hands, and therefore it is prayed that they may account for it with interest; with this interest they ought to be chargeable: And there is no ground to stop the interest at the time of putting in their answer, though they thereby declare, that they are willing to account for it, as the court shall direct. That interest now must be added to the principal, to increase the sum that is to be lent out to the poor inhabitants. The corporation claim an allowance of the 21l. distributed at 10s. per head; this advice was far from being proper. The intention of these charities, was to assist the industrious poor, by lending them money to go on with their callings. But the giving them such small sums as 10s. a piece, was an encouragement to make them idle: however, as this money has been disposed of among the poor, and as it was only a mistake of judgment in the corporation, they must have an allowance for it. But for the future this
method

method of putting out this money to strangers, upon good security, and distributing the interest among the poor, must not be continued. The 90l. paid to the prosecutor for his costs, upon his consenting that the decree should be reversed, must not be allowed.

This was a commission that there was a foundation for; it was to compel the corporation to lend out this money in small sums to the poor, according to the directions of the charities. The commissioners decreed that the money should be lent out in that manner. They ordered indeed that the corporation should pay the costs of this commission; and that perhaps was more than they could justify. Exceptions were taken to this decree, but instead of arguing them, the corporation and prosecutor came to an agreement that the prosecutor should have this 90l. for his costs, and that the decree should be reversed: this was certainly wrong, both in the corporation and the prosecutor. There is no instance of costs in these cases being directed to be paid out of the charity money, unless where the bill is brought to establish a charity. He did not think the circumstances strong enough to take the money out of the hands of the corporation, and place it in other trustees; nor was he inclined to take the money into the court. But the circumstances are strong enough, to direct that the corporation shall pay the costs of this suit. The information was made necessary by what they did. The disposal of the 90l. was a gross misbehaviour; nor have they lent any part of the 590l. to the purposes for which the charity was given ever since the year 1725.—And decreed accordingly.

K

If

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2 Atk. 328.

If it is quite uncertain from the words of a will, whether the testator intended that the capital or the interest or produce of it, should pass; the court will not confine it to the interest, or produce.

Executors,
Duke, 67.

If the executors of a charitable bequest, jointly concern themselves in the estate, and one of them misemploys the bequest, and dies; the survivor is liable for the whole; but if he did not act, it is otherwise: If they detain money in their hands bequeathed to charitable uses, they are liable to damages, which will be, the interest due for the time; this is now fixed by the court at 4l. per cent.

1 Atk. 356.

And it has been held that such interest commences, in all charity legacies, from the testator's death: though this must be understood where the testator himself made no limitation of time for payment of the legacy: and whether the legacy be in suit or no, still the same interest accrues.

A testator directed that the executors or administrators of his wife should pay 100l. to be let out to young tradesmen, an institution established in Queen Elizabeth's time; but it was held void, for a man cannot charge the executors of his wife.

Bro. Cha. Rep.
12.

A legacy of 200l. was bequeathed to the governors of Queen Anne's bounty; and the residue of the testator's estate to be divided into thirds, and gave one third to Queen Anne's bounty, or to the society for propagating the gospel; another third to his necessitous relations; and

and the remaining third "*to some public charity.*" The legacy to *Queen Anne's bounty*, was held to be void, as by the rules of that institution, it must be laid out in land; the one third of the residue given to the same charity, or to the society for propagating the gospel, was on the same account ordered to be paid to the latter; and the other third to "*some public charity,*" was declared good, but that the executors ought to dispose of it under the eye of the court; and therefore they were referred to the master to propose a charity: there was no question as to the third, given to necessitous relations.

The court seems always to have given to the representatives, the power of disposing or suggesting a charity where there has been any want of specification in the will; so likewise where the will has not been proved.

Thus Mr. Holt bequeathed one half of the residue of his personal estate, which was very considerable, to the Foundling Hospital, and the other to the "*Lying-in Hospital, and if there should be any more than one of the latter, then to such of them as the executors should appoint.*" He afterwards struck out the name of the executor, and never inserted another, and died in 1775: the next of kin took out administration with this testamentary paper annexed. The Lord Chancellor, *Thurlow*, said: It seems if this had been a private legacy, and a selection of objects out of which the legatee was to be chosen, it is allowed, that it would be of the essence of the legacy, and it could not take place, unless there was an expression of general favour, to let in all the objects. My notion is, that in the case of charities, this court derives a great latitude of authority from the extensive nature of

Bro. Cha. Rep.
12.

most charities; because they cannot go upon the same strict rules which prevail in private cases. But that is well resolved into the purpose and the mode. When the testator is willing it shall go in the largest extent, the court will follow his intent in marking out objects. I wish to follow this method in construing the intent of testators.

Post. 134.

I have stated a distinction between charities and private cases, so as to lay down a latitude more wide than is to be wished to be left to courts of justice. In the *Downing College* case, the difficulty was, that when the anterior estates were spent, there was nobody to take the equitable dominion; and the question was, whether the analogy held, between it and a legal estate with nobody to take, which descends to the heir at law, till an object arises. Even in private cases, the distinction between the object and the mode has been attended to. I will look into the cases, whether selecting one out of the objects is regulating the mode only.

In July following, his lordship gave judgment.

The question is here, whether the legacy is void, the executor's name being struck out, and there being no person on whom it could devolve; or whether the court will sustain it?

1 P. Wms. 674,
425.

Finch, 194,
222, 245.

It has been argued, that the court has great extent of jurisdiction in making legacies certain, which were before uncertain; and secondly, in applying them where it is not known to what use they were intended. There has been at all times, an exercise of this authority,

rity, where a legacy has been doubtfully given: as in *Attorney General and Syderfen*; which was a legacy to such charitable uses as he had appointed, but the appointment was not found; the court decreed, the charity to be directed by the crown, as there had been an appointment. In *Wheeler and Sheer* in Lord King's time, there was no appointment, but the testator had procrastinated the legacy; that evidence satisfied Lord King that the testator had not so fixed his mind as to separate the legacy from the personal fund, and he would not carry the charity into execution. — The cases have proceeded upon notions adopted from the Roman and Civil law, which are very favourable to charities, that legacies given to public uses not ascertained, shall be applied to some proper object. From Swinburn down to Lord Hardwicke's time, that would be the effect where the object is disappointed: but the present case is different; here the testator giving a legacy to the next of kin, and to the executor, names a particular charity, a residuary legatee; the question is only how the trust shall be carried into execution. I remember to have read a case somewhere, where a legacy is given to B. for the benefit of non-conforming ministers, with the advice of C. and D: at the testator's death B. C. and D. were all dead; yet the court sustained the legacy. His Lordship therefore referred it to the master to consider to which of the lying-in hospitals the legacy should be paid. And he afterwards ordered it to be paid to one which the master reported to be most proper. The sum was large.

*Moseley, 238,
301.*

*2 Eq. Ca. Abr.
193.*

Where trustees have power to distribute generally according to their discretion, without any object pointed

*2 Vezey, 59.
Gow v
Maie*

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out, or rule laid down; the court interposes not, unless in case of a charity, which is different, the court exercising a discretion, as having the general government and regulation of charity.

A very late case has been mentioned to me, where the testator gave a sum of money "*for the benefit of the poor clergy.*" On a petition to the Chancellor, his Lordship established the legacy, and directed it to be paid to the corporation of the sons of the clergy.

Intended charities not in being.

The court has favoured, by several decisions, devises made for intended charities, though they were not *in esse* at the time of making the will.

I am greatly obliged to the friend already mentioned for his communication of notes on the following very important case of *Downing College*.

*J. L. Anth.
550. 571.
Love v. Will.
of Sir D.
Senell v.
3.*

Sir George Downing, of Gamlingay Park, Cambridge-shire, Bart. by will dated 20th of December, 1717, devised to trustees divers lands freehold, copyhold, and leasehold, for several life estates, with remainder finally in default of certain issue, to the same trustees and their heirs, in trust out of the rents of said lands to purchase the inheritance in fee-simple of some piece of ground in Cambridge, proper for erecting a college within that university, to be called *Downing College*; and that a charter should be applied for to incorporate the same, and when founded, that the trustees should stand seized of the lands to be so purchased for the use of the collegiate body and their successors for ever.

Testator died in June 1749, without revoking or altering this will, but by a codicil charged his estates with two annuities :—All the devisees for life dying without issue, the estates devised became applicable to the purchase of land to found the college.—The trustees all died in the testator's lifetime.—The testator's cousin, *Sir Jacob Garrard Downing*, was his heir at law and executor, who dying and leaving Margaret his widow and executrix, she claimed the leasehold estates, and the freehold and copyhold were claimed by the surviving heirs at law of *Sir George Downing*. The copyhold lands had never been surrendered to the use of the testator's will.

On an information at the instance of the Chancellor, Masters, and Scholars of the University of Cambridge, to establish the will and confirm this charity, it was set forth in Lady Margaret Downing's answer, that Sir George Downing purchased several freehold estates after the making his will ; that the whole lands were charged by the codicil with two annuities, and that the personal was not applicable thereto :—That Sir J. G. Downing found the estates in ruinous condition at the death of Sir George, and had laid out 30,000*l.* in improvements ; that part of the lands devised were held under lease from King's college, and from the dean and chapter of Ely, some of which Sir George had renewed, and some had expired in his lifetime, since making his will ; and other of said lands had come to him only by mortgage.

The several points that were the principal subjects of argument were as follow :

1. Whether the trusts were not lapsed by the death of

all the trustees in the lifetime of the testator Sir George Downing? And cited *Atty. Gen. v. Hickman*, 5 Geo. II. Select Ca. Equity. Duke on Charitable Uses, 81. Finch, 245. 1 Vern. 224. *Atty. Gen. v. Syderfen*, and statute 43d Eliz. under which courts of equity will carry trusts into execution.

2. Whether the devise for the erection of the college was a charitable use, and protected by 43 Eliz. or void under the statute of *Mortmain*?

3. Whether the devise was within the 9 Geo. II. c. 36. the will being of a prior date to that act; but testator having died since? And—

4. (Which was the great question in the cause) Whether a devise to a corporation not *in esse*, and the existence of which would depend on the will of the crown (supposing it a charitable use), could be established by a court of equity?

Besides the foregoing, there were several subordinate questions; as—

1. Whether the copyholds not surrendered to the use of the will passed by way of appointment or not?

2. Whether the leasehold renewed after the date of the will passed?

3. Whether the real estate was charged with certain annuities, in exoneration of the personal, or only as an auxiliary fund?

4. Whether

4. Whether the university had any interest at stake, so as to sustain the question? (This point does not seem to have been seriously contested.)

5. Whether certain erections (as, barns raised on rollers) among the improvements on the estates by Sir J. G. Downing, were to be considered as fixed to the freehold or part of the personal estate of Sir J. G. Downing?

6. Whether the limitations in Sir George's will were of trust estates or of uses executed?—Of this the court seemed clearly satisfied; holding them to be trusts, such as related to the intended new college.

7. Whether the codicil was a republication of the will, so as to pass certain after purchased lands?

8. Whether certain lands mortgaged to Sir George, and of which he had been long in possession, though the equity of redemption was not released or foreclosed, passed by the will?

As to the four principal points that arose: On the first, some cases are cited above, which induced the court to be of opinion that the trusts were not lapsed by the death of the trustees in the lifetime of the testator. And Lord *Camden*, Chancellor, said, The death of the trustees is immaterial; there are persons now living, that may apply to have the trusts carried into execution; and he mentioned the case of *Burgefs v. Wheat*, where a devise is executory, the heir is compellable to carry the trusts into execution, where those trusts are
merito-

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meritorious: the court always considers the trusts as existing, though the trustee is dead.

On the 2d principal point, the following cases were cited: In *Porter's case*, 1 Co. 24. it was determined, that a gift for the augmentation of the university was a charitable use, and therefore not within the statutes of *Mortmain*.—Duke 74, 77, 81, 83, 84.

On the third principal point, the case of *Carvel v. Carvel* was cited, in which a devise not attested, was held good, being dated before the statute of frauds: the testator dying after that statute.

On the fourth and chief point—It was argued for the university, That if the objection was founded, that there was no object *in esse*, it would hold in all cases where a trust is for a general purpose. That if a devise is for the encouragement of learning, the court will modify it, so as to render it capable of taking effect. That this is a charity both useful and ornamental. *Porter's case* cited above is a strong authority in point. In the case of *Sutton's Hospital*, the object was not *in esse* at the time of the conveyance. The *Savoy* was established under the will of Henry VII. though the gift was only for an intended hospital.—Under the 43 Eliz. the court may carry these trusts into execution as far as it can.—See Duke 81. Devise to the poor, though no distinct object, held good. A devise is never construed void, unless it is so dark that the court cannot find out the testator's meaning. The court has a free and extensive jurisdiction in the case of a charity, and is not confined to the formal methods requisite in other proceedings.

Finch, 245.
1 Vern. 224.
1 Atk. 412.

1 Atk. 356.

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Cro. El. 288,
Duke, 74, 77,
83, 84.
Hob. 136.
Floyd's case.
Collison's case.
2 Vern. 266.

The foundations of St. John's and Sydney Colleges were to take effect after the testator's death.—*Corporation of London, v. Christ's Hospital*; *Atty. Gen. v. Doyley*, 1735. Devise void at law, good in equity under the 43d Eliz.—In *Tancred's case*, the uses were allowed to be void in law; but being a charity they were held good in equity, and there the objects not so meritorious as here.

2 Eq. Ca. Abr.
Viner Abr.
Tit. Mortmain.
Finch, 221.
1 Black. Rep.
90.
Post.

Lord Cowper directed Dr. Ratcliffe's trustees to apply for a license; the institution of travelling fellows, not so meritorious, as founding a house of learning.

Mr. Yorke admitted that this case was new *in specie*, but not *in genere*—That the devise is not void for want of a proper object, for the object is pointed out. This is not like *Edge's case*, 1 Salk. 229; this is not a contingent remainder. It is a present devise upon an executory trust, and being so, it is not material whether the license precedes or follows the devise. The licenses for the foundation of St. John's and Sydney Colleges were subsequent to their foundations. *Fitz. N. B.* 224. *Duke*, 163.—1 Vern. 345, is exactly in point, *Atty. Gen. v. Bromley*. The consent of the crown is obtainable *ex debito justitiæ*.

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the devise was necessarily void, even though to a charitable use.—2 P. Wms. 369.

That this devise is contrary to all the statutes of *Mortmain*, and great stress was laid upon the inconveniencies arising to the public from such alienations.

That the use is to arise at too remote a period.—That it is uncertain and depends upon the will of the crown, or of the minister.—That the case of the *Atty. Gen. v. Bromley*, and that on *Tancred's* will, are not applicable, being charities within the 43d Eliz. That in this case, the trusts are against law and a forfeiture under 15 Rich. II. Not so in *Porter's* case, the license to hold in *Mortmain* ought to have preceded the will : F. N. B. 123. That the trust is not to arise until a corporation is erected.—That whoever takes an estate *in futuro*, must take it in remainder, or as an executory devise ; here it can operate as neither, the corporation is only *in posse*. That there was no corporation at the death of Sir Jacob Garrard Downing, therefore the devise was void.—That it would certainly have been so, if to a private person. See Bro. Abr. Tit. *Mortmain*. 1 Roll. Abr. 609, ch. 50. *Perkin Pl.* 505, p. 221. Co Lit. 264. 4 Leon. *Corpus Christi*.

That the 43 Eliz. is a remedial law, but under that statute the court cannot effectuate what the judges could not do by law : the law says, no land shall be given in *Mortmain* ; shall this court wait to see whether the crown will grant a license contrary to all the *Mortmain* acts, and particularly the last ? That the case of the *Atty. Gen. v. Hickman*, was a case about personal estate

estate merely. That the testator lived twelve years after the death of his trustees, and when he died the 9 Geo. II. had prohibited his giving his estates in *Mortmain*. That the case in *Moore* 62, being a devise to a trustee to sell, the sale was avoided by the death of the trustee in the lifetime of the testator. Why is the university to apply to the crown? the deceased trustees were the persons to apply. It is even doubtful whether the crown could incorporate a new society with the old body.—That *Porter's* case differs from this, for the only thing there determined was, that the devise was not to a superstitious use. That the cases of St. John's and Sydney Colleges, are not applicable, because Hen. VIII. cooperated with the donors. That this court can only do under the 43d Eliz. what the commissioners could do, but they can't make a corporation capable of taking contrary to the statute of wills.—That colleges are not within the 43d Eliz. and all the cases cited are of poor scholars.

In reply, the counsel for the university rested on the cases they had cited, and principally on *Porter's* case, *Atty. Gen. v. Bowles*.—Burn. Ecc. L. Tit. *Mortmain*.—*Atty. Gen. v. Tindal*. Finch 245. 2 Vern. *Baliol Coll. Gower v. Mainwaring*, 1750. Cases of the *Temple* and *Lincoln's-Inn*.—That this use was lawful and meritorious.—That the distinction in *Porter's* case between superstitious and charitable uses, established the validity of the latter, though future, and not *in esse* at the death of the testator.—That the cases cited prove uses void, where *Cestuy que use* was not *in esse* even before the 43d Eliz. That statute, and the 7 and 8 Wm. III. support such uses if charitable. Duke 62, 81, 83, 84. 2 Vern. 245,

245, 755: and that this court is bound to carry the trusts of Sir George Downing's will into execution, as an executory charitable use or meritorious trust.

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After several hearings on this cause the Lord Chancellor Camden, having been assisted by Clarke, Master of the Rolls, and Sir Eardley Wilmot, Lord Chief Justice of the Common Pleas, his Lordship on the 3d July, 1769, declared their unanimous opinion, That "the trust of the charity in question ought to be carried "into execution, in case his Majesty should grant a "charter of incorporation, and license to take the "devised premises in *Mortmain*;" and the decree established the will; and the defendants, the heirs at law, were to be at liberty to apply to the crown for that purpose. That the freehold estates purchased by the testator after making his will, did not pass by virtue of the codicil; the will not being thereby republished: and the leases renewed or run out after making the will and before the testator's decease, did not pass by the will, but fell into the residue of his personal estate. That his copyhold estates not surrendered to the use of his will descended to his heir at law. That the annuities given by the codicil ought to be satisfied in the first place out of the personal estate, and that the real estate was only charged therewith in case the personal was deficient. And referred it to one of the masters of the court to inquire the annual value of the premises devised to the charity, in order to enable the heirs at law to form a judgment what number of fellows and scholars could be maintained by the endowment; and they were to be at liberty to contract for a piece of ground within the university of Cambridge, whereon to found the college

college conditionally, in case the charter and license should be granted: and it being suggested that certain erections on part of the devised premises were so constructed as to be moveable, referred to the master to inquire the nature of them and state his opinion thereon to the court. And also to inquire into the state of testator's unredeemed mortgages, &c.

Under this decree Lady Downing and her representatives acquiesced for upwards of twelve years, and so well convinced was she of the rectitude of it, that she enrolled it herself.—But in March 1781, a bill of review was filed, but the demurrer thereon was never argued, with intent to appeal to the house of lords: but no appeal has been since made.

On the same principles, the court decided in a recent case, relative to a legacy for establishing episcopacy in America. The late Archbishop Secker gave by will (among other charitable legacies), after the death of the survivor of two relations, which survivor died lately, 100*l.* 3*l.* per cents to his trustees, Dr. Stinton (since deceased) and Dr. Porteus, the present Bishop of Chester, to be transferred to the society for the propagation of the gospel in foreign parts, towards *establishing a bishop or bishops in his Majesty's dominions in America*; and ordered “that if
 “any charity to which he had given legacies should no
 “longer subsist at the time of his decease, or should have
 “been so grossly abused and perverted that they should
 “think giving any thing or so much to it improper;
 “they should give what he had appointed for it, or such
 “part of that sum as they should please, to any other
 “charity which they should approve, whether men-
 “tioned by him or not.”—And by a subsequent codicil
 reciting

*Atty. Gen. v.
 Bp. of Chester.*

reciting a former, wherein he had by a strange inadvertence given a legacy towards the augmentation of poor livings in the diocese of Canterbury, in conjunction with Queen Anne's bounty, which was void by the *Mortmain* act, he did now revoke the same and direct the same legacy to be applied towards *the repairing or rebuilding of houses belonging to poor livings in the same diocese.*

Bro. Cha. Rep.
444.

In regard to the last mentioned legacy, the Atty. Gen. (Kenyon) insisted, that a gift of money to be laid out in *building upon land* already in *Mortmain*, is good in law; and cited for that purpose *Brodie v. Duke of Chandos*, and *Atty. Gen. v. Hutchinson*.*

Mr. Mansfield for the Bishop of Chester, did not controvert this, but contended; the selection of objects belonged, since the death of Dr. Stinton, to the bishop of Chester alone. As to the other legacy, there being *then* no bishop in America, or the least likelihood of there ever being one, *that* he contended was a void legacy, and fell into the residue.

1785.

Ante, p. 134.

But Thurlow, Lord Chancellor, said; the money must remain in court, till it shall be seen whether any such appointment shall take place. The case of *Downing College* was stronger than this: It was to be built at a distant time, and could not be so without the King's license,

Brodie v. D. of Chandos,
Before L.
Apsley, 1775.

* £.600 was given by will to be laid out in rebuilding a parsonage house on a living in Hants. Held good, notwithstanding the statute of Mortmain.

Atty. Gen. v. Hutchinson.

£.3500 was given by will to build and endow a school in a particular parish, which parish before had land, and the bequest was held good.

which

which was long withholden; yet Lord Camden retained the devised estate in the hands of the court.

With respect to the selection of objects for the other legacy, it must be referred to the Master, and proposals of proper objects must be laid before him.

This decision, in May 1785, was agreeable to the former adjudications already mentioned: where there is a want of specification of particular objects to receive a charitable legacy, the executor must dispose of it under the eye of the court; so here, he was directed to propose to the Master such poor livings in the diocese of Canterbury, as were objects, to partake of the benefit of the legacy left for repairing or rebuilding their parsonage houses.

As to the other legacy; between the time of the above decree and the final order (made in the cause, for the payment of that and all the other charitable legacies, which was in May 1786), Dr. Seabury received consecration as Bishop of Connecticut from the nonjuring bishops in Scotland, with full powers to preach the protestant faith *in partibus Infidelium*; and three others have very lately received the same holy office from the hands of the Archbishop of Canterbury. The legacy was bequeathed towards establishing a bishop *in the King's dominions* in America. Dr. Seabury was sent here by the people of Connecticut, who are with the rest of those colonies aliened from all allegiance to this crown; and all the *postnati* born there,* since the definitive treaty, are aliens and disheritable in England: this was the reason,

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* The converse of Calvin's case, 7 Rep. 1.

no doubt, why the council refused him consecration at the hands of our Archbishop, and obliged him to apply to the sect of bishops in Scotland nonjuring to the English crown; Dr. Seabury, it is presumed, could therefore take no benefit from the above legacy. The late consecration is otherwise, being intended for the province of Canada, which remains annexed to the British dominions.

2 Vezey, 275.
Atty. v. Cock.

A devise of land was charged with an annuity to a minister of a *Baptist* meeting-house. (Testatrix died before the last act.) The question was, whether this was a charity of such a nature as is proper for the court to countenance or establish? In aid of the arguments for the question, these cases were cited: *Da Costa v. D'Pays* in 1743, where *Elias D'Pays*, a Jew, appropriated a sum of money for the establishment of an assembly for reading their holy and divine law for ever. It was held illegal, as against the propagation of the christian establishment. *Atty. Gen. v. Andrews* in 1748, copyhold lands devised for benefit of *Quakers*, and established as a good charity. *Sir J. Strange* (for Lord Chancellor) said, these cases seem strong in support of this. The Baptists are persons the legislature have thought proper so far to countenance, as a denomination of christians, as to extend the toleration to them, standing on the same foot as *Quakers*, another species of dissenters: If therefore the court has established it in case of a provision for *Quakers*, there is no reason why a difficulty should be made to give this kind of dissenters the benefit of that provision. In the *Quaker's* case, the court went a great way, not only countenancing it as a good charitable use, but supplying the want of a surrender to the use of the will. It is somewhat material that the *Mort-*
main

main Act has made no distinction between one set of people and another. The minister was decreed to have the arrears, and the charity established for payment for the time to come, and his costs.

By the exemption contained in the *fourth section* in favour of the universities, any land or personal estate to be laid out in land, may still be disposed of, in trust for their benefit, or for any of the colleges therein, as it might have been before the making of this act: But the extension to the colleges of *Eton, Winchester, and Westminster*, seems confined to any disposition "for the better support and maintenance of the scholars only upon the foundations;" so that if lands, or personal estate to be laid out in lands, were directed by will to be applied for any other purpose in those colleges, the devise would be void.

9 Geo. II. c. 36.
Sect. 4.
Universities, &c.

By the *fifth section*, colleges which are already possessed of as many advowsons of ecclesiastical benefices, as are equal in number to one moiety of the number of their fellows or students upon the foundation, are rendered incapable of purchasing, receiving, or holding any others, except such as are given for the benefit of the headships thereof. Otherwise the successions might happen so rapidly, as that fit members might not be left either to govern the college or to succeed to the vacant benefices. The extent of this clause (and indeed, of the whole

Sect. 5.
No College to
hold more
Advowsons, &c.

148 CHARITABLE USES.

1 Blackstone's
Rep. 90.

statute) underwent a very full discussion before Lord-Keeper Henley, in the case of Mr. Tancred's will; as follows.

Mr. Tancred, by deed in 1721, conveyed his estate to feoffees to the use of himself for life, remainder to his first and other sons in tail, remainder to *certain officers* of Christ's College, Cambridge, to maintain certain students there, in the sciences of physic and divinity, and four students of the law at Lincoln's Inn, and also certain pensioners, viz. decayed merchants, soldiers, and clergymen, who should reside in his capital house at Wicksey. By his will in 1746, duly executed, he confirms this deed; but fearing the statute of *Mortmain* of 9 Geo. II. might defeat the uses thereof, he orders that in case the said uses or any of them should be contrary to law, the estates so settled should go to the *fellows* and *scholars* of Christ and Caius College, to be divided in certain proportions for the augmentation of their stipends.—On an information to establish this charity, at the relation of Christ College, against the heirs at law, there arose two questions:

1. Whether this was a conveyance to Charitable Uses under the statute of Elizabeth, and therefore to be aided by this court?

2. Whether it fell within the purview of the statute of *Mortmain* 9 Geo. II. and was therefore a void disposition?

Per *Henley, Keeper*:—The conveyance of 1721 is admitted

admitted to be defective; the use being limited to certain officers of the corporation, and not to the corporate body: and therefore there is a want of persons to take in perpetual succession.

The only doubt is, whether the court should supply this defect, for the benefit of the charity, under the statute of Elizabeth. And I take the uniform rule of this court before, at, and after, the statute of Elizabeth, to have been, that where the uses are charitable, and the person has in himself full power to convey, the court will aid a defective conveyance to such uses:—Thus the devises to corporations were void under the statute of Henry VIII. yet they were always considered as good in equity, if given to Charitable Uses. There is here no doubt of Mr. Tancred's power to convey, and the uses are truly charitable and truly proper in themselves, the education of poor scholars in the university, students at the inns of court, and poor persons in his own house. Therefore, however unbecomingly Mr. Tancred expressed himself in his will, with respect to his relations (and indeed he seems to have cast off all natural affection), and however reluctant I may be to establish a disposition made under this turn of mind, yet sitting here judicially, I am obliged, by the uniform course of precedents, to assist this conveyance; and more especially, because it is the peculiar province of a court of equity, to protect men in the freedom of disposing of their property, which is a point of the utmost importance in a trading country.—This conveyance therefore being established under the statute of Elizabeth, we are next to consider how it is affected by 9 Geo. II.

34 and 35 H.
VIII. c. 5.

Court will assist
a defective
Conveyance to
Charitable Uses

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Mr.

Mr. Tancred by his will makes a disposition by way of substitution : " In case the dispositions are within the " statute of *Mortmain*, then to the fellows, &c. of the two " colleges." The relators admit, that part of the disposition is void with regard to the pensioners and law students ; but then they contend that the substitution must take place by reason of the exception of the universities and their colleges in the statute. The defendants (the heirs at law) contend that all is void, as well the substitution as the original uses ; because the devise is not to the body corporate, but only to the particular fellows in their personal capacity. No cases have been cited on either side : we must therefore form an original construction of this clause in the statute of *Mortmain*. And my opinion is ; first, that this is a devise for the benefit of the whole body corporate : Secondly, had it not been so, I should still have thought that the legislature intended, by the *exception* in the statute, *to save a devise for the benefit of particular members*, as well as of the whole body. The legislature meant to except such devises as were really and bonâ fide *for the benefit of colleges* ; not those in which the legal interest only passes to the college, *In Trust for other Charitable Uses* ; for then the statutes of *Mortmain* might be defeated every day. And this devise is for the benefit of the whole society, even of the Master himself, who must pass through a fellowship, and partake of Mr. Tancred's bounty in his progress towards the headship. Besides, we all know that, in these houses of education, any encouragement for youth to enter into a particular college, is a general benefit and profit to the whole society.

Exception as to Universities was for their benefit, not to make them Trustees for other uses.

The

The legislature has thrown no restraint on these gifts when made to the body corporate of either *university*, or to colleges *already established* there; intending *not to increase the number of foundations*, but to have those better endowed which are already established. They judged that leaving this path open, would not for some time be liable to much inconvenience:—But when they saw an inconvenience, they restrained even gifts to colleges. Livings are grantable to these bodies, only till they amount in number to a *moiety* of the fellows; lest, if the succession be rendered too rapid, there should not be persons left of sufficient age, temper and discretion, to govern the society, and answer the great purposes of the foundation.—This devise to the fellows and scholars contains no circumstances that intimate any intent to give *them* the estate in their personal capacities. It is clearly to them, as members of the body corporate, for the perpetual augmentation of the revenue of themselves and their successors.

Therefore his Lordship decreed the disposition to the pensioners and law students void, under the statute of *Mortmain*; but he established the exhibitions to the students in divinity and physic, and directed the substitution to take place for the benefit of the fellows and scholars of *Christ* and *Caius* colleges, in their corporate, not their natural capacities.

Whorwood devised the remainder of his real and personal estate to *University Coll. Oxon.* and by a codicil directed that the senior fellow should be possessor of all his estate, reside in his house *hospitably*, and sometimes give *entertainments* to the poor, &c.—A devise to a college

1 Vezey, 537.

generally for their benefit, to increase the foundation, to augment a headship or fellowship, or found a new one, is a laudable charity and deserves encouragement ; and therefore they were excepted out of 9 Geo. II.— But this is not a devise of that kind for academical or collegiate purposes ; but only to establish somebody to live at his house for ever, and to make his estate unalienable : answering no good purpose to the college or the public.

9 Geo. II. c. 36.
sect. 6.
Scotland, &c.
exempted.

The *last section* of the act exempts all estate real or personal in *Scotland*, from the restraints already imposed on those in England. There is a case already cited in page 98, where an estate in *Ireland* was devised to Charitable Uses in Ireland :—I have met with none, where estates either in Scotland or Ireland were devised to charities in England ; though it is presumed, if the charities were incorporated, and so become capable of taking, such a devise would not be void by the former clauses of this act. Upon the same principles, a devise of lands, or of a rent charge on lands in the West Indies, to a charity in England, is good. Instances of the latter have actually occurred, and the executors or heirs at law never thought of contesting the devise, against the charity.

Having now recited all the cases most material towards an exposition of this statute, I cannot but deem any recapitulation of them unnecessary ; they sufficiently prove the liberal and extensive manner in which the court has at all times been desirous of explaining it, as well

well as the regard it has always testified for a moderate zeal in the support of charitable institutions.

But before I proceed to the concluding parts of this tract, I must beg leave to recite a very curious case, which arose some years before the date of this act, on perhaps the most extraordinary will that ever appeared in the legal annals of this kingdom.

Richard Norton, of Southwick, in Hampshire, esq. died in 1732, leaving a will dated in June 1714 (and several codicils and testamentary schedules), wherein after his debts, &c. should be punctually discharged, he devised all his real and personal estates whatsoever in the county of Southampton, with every thing that he did hold, possess, or enjoy, or in any manner whatsoever it be belonging to the same real and personal estates, to the poor, hungry and thirsty, naked and strangers, sick and wounded, and prisoners, and to and for no other use whatsoever; and did thereby make, constitute and appoint the poor abovesaid to be his general and absolute heir and heirs to the end of the world. And he says, "I do presume to make, constitute and appoint all and every person and persons, that do, shall, or may make or compose, or are to be the supreme legislature of Great-Britain in parliament assembled, to be my executors."—"And if I have presumed too high, and it be refused, then "I beseech the Archbishops together with the Bishops of "Great Britain or of England, for the time being, and "their successors, to be my executors:" any five of them, whereof the Archbishop of Canterbury to be one, by any writing

writing under their hands to act, order, do, and fully perform and execute his true meaning and intent therein before declared, to the end of the world: "And I do
 "most humbly beg of them all to be zealous advocates
 "for the poor as aforesaid, to the legislature of Great
 "Britain: and if, at the time of my death, the supreme
 "legislature should not be sitting, then that any five of
 "them the said Bishops, &c. whereof the said Arch-
 "bishop to be one, would immediately be pleased to take
 "care provisionally of all matters therein contained, and
 "do all acts until the next parliament should meet and
 "be held."

The consideration of so extraordinary a will necessarily came under the investigation and care of the parliament; and to the end that its validity, as far as it related to his personal estate, might be examined and determined in the ecclesiastical court, and that fit persons might be appointed to institute, prosecute, and defend all suits concerning the same, as far as the same relate to his personal estate, a private act was passed empowering three persons named in the act, to sue for administration, with power to the ecclesiastical court to appoint others in case of death: and it was declared that the act should not give greater force to the said will, than it had before.

6 Geo. II. c. 32.

10 Geo. II.
c. 37.

And in 1737, three years after the last *Mortmain* act, another act was passed, to prevent the statute of limitations (21 Ja. I.) from being pleaded by any persons claiming under this will, against any title which Thomas Norton esq. had to the manor of *Old Alresford* in Southampton, by indenture of settlement, or the rents or profits thereof.

I have

I have not been able to learn what steps have since been taken, or how the estates are applied; but we have already shewn, that bequests to the poor *indefinitely*, means all the poor of England, and vests the distribution in the discretion of the crown.

I shall now very briefly take notice of such hospitals as have been established by the authority of the legislature, or have met with the liberal patronage of the state: of the latter there are very few; not from any political cause, or want of liberality in our rulers, but because private bounty has extended itself so far, as generally to lay the foundation and maintain the superstructure by its own hand!

Legislative charities, &c.

The Charter-house is recited to be a body corporate, and founded by Thomas Sutton esq; and five governors are allowed to act.

8 Geo. I. c. 29.

The act for the incorporation of Guy's Hospital, which was built in his lifetime, and to which he gave the residue of his estate, amounting to 200,000l. empowers the corporation, if they sell any of the lands thereto belonging, to lay out the produce in some other purchase. And the same provision appears in the act for incorporating the hospital at Bath, which was erected for the purpose of giving the poor the benefit of coming to drink the Bath waters. And an act afterwards passed for enabling the Bath Hospital to take lands, &c. by devise, to a certain value; and the following decision since took place thereon:

11 Geo. I. c. 12.

12 Geo. II. c. 31.

19 Geo. III. c. 23.

2 Vezey, 53.
Mogg v.
Hodges.

The words in this act are to be considered as in a charter. The charter of incorporation was only granted by parliament to avoid expence to the promoters of the charity, who were forced to apply to parliament for some other powers, which the crown could not grant: therefore the charter was inserted in the act, and is to be construed as any other charter given by the King only. This particular clause was inserted to avoid the trouble of applying for a license in *Mortmain*, and is to be considered as such a license: the governors are thereby empowered to take lands to such a value, but still with a proviso that they are granted to them in the manner prescribed by that law.

13 Geo. II.
c. 29.

The governors of the Foundling Hospital are empowered to purchase and hold lands to the value of 4000l. per annum, and their land tax not to be raised above what was paid in 1739, notwithstanding improvements: the children received and educated there gain no settlement, and the house, &c. are to be exempt from parish fees of christenings and burials, and to have a chaplain, &c. Parliament gave them 10,000l. in 1756, and a further sum of 30,000l. in 1757.

29 Geo. II.
c. 29. f. 13.
30 Geo. II.
c. 26. f. 14.

29 Geo. II.
c. 29. f. 7.

The parliament in 1756 also gave 20,000l. towards building the hospital for sick and wounded seamen at Haslar, near Gosport.

7 and 8 Wm.
III. c. 21. f. 10.
8 and 9 Wm.
III. c. 23.

Greenwich Hospital, which stands upon the site of a royal palace, was incorporated by William III. 10th September, 1695, and an annual sum granted thereto out of the treasury: Every Seaman pays six-pence a month towards it: The king was empowered to grant

12 and 13 Wm.
III. c. 13.

part

part of his manor of Greenwich to its use. The crown, by a variety of acts, has been since empowered to dispose of large sums for its benefit; unclaimed prize money has been bestowed upon it; the rents of the Derwentwater estates, forfeited for high treason, were applied to it: and the governors were empowered to purchase lands for the completion of it.—Its opulence, and grateful care of those brave men whose vigor has been spent in the service of their country, is a monument of praise to our legislature and our country.

4 Ann. c. 12.
f. 14.
6 Ann. c. 13.
f. 11, &c.
10 Ann. c. 17.
8 Geo. II. c. 29.
11 Geo. II.
c. 30.
22 Geo. II.
c. 51.
25 Geo. II.
c. 42. And a
variety of other
statutes.

The act of incorporation of the governors of the Magdalen Hospital, gives them power, “without license “in *Mortmain*, to purchase, take or receive any lands, “tenements, or hereditaments, or any estate or interest “arising or derived out of lands,” for the charitable purposes of that institution. All right of commonage on the lands where the hospital is built is extinguished; and power to exchange lands for the use of the hospital is also given.

9 Geo. III.
c. 31.

Through the humane and benevolent assistance of well disposed persons, many hospitals have been erected for the charitable reception of pregnant women, have afforded great relief in times of the utmost distress, and deserve due support and encouragement; but the children who were born there became burdensome to those parishes; wherefore an act was passed to regulate the admission and management of patients there, &c. and it ordains that no such hospital shall be erected without license from the justices, that the children born shall follow the settlement of their mother, and their removal, if necessary, to be at the charge of the parish, whose officers

13 Geo. III.
c. 82.

officers may apprehend the father of any bastard. On their admission, they must produce an affidavit that they are married or single, or be examined thereon before a magistrate.—Four days notice must be given to the overseers before any mother of a bastard child can be discharged; but they are not to be removed till the mother is sufficiently recovered to be taken out; and the master of the house is *authorized to detain her until that time*; but not more than six weeks against her will.

And here I must beg leave to remark in general, that it sometimes happens, that ingratitude, self-will, or impatience at the restraint of regimen, under which patients in all diseases are necessarily ordered, induce them to insist on a too early release from the hospital in which they have taken refuge, and to imagine that the master has no power to retain them: to this it may be answered, that as they have entered into a society for a temporary relief, they are bound by all its regulations. If their distemper is contagious, the injury they may do the community is far more grievous than their own personal restraint; if it is not so, the reputation of the house for their cure is at stake with the public; and therefore justice will confirm and justify the master or other proper officer, in detaining them, in the words of the above act, “until they are sufficiently recovered to be taken out.” If indeed they get away clandestinely, there is no remedy, or right of openly laying hands on them and bringing them back; but in most hospitals this is punished by a forfeiture of the clothes and deposit money left behind them to the use of the charity.

O F T A X E S,
A N D
E X E M P T I O N F R O M T H E M :
A N D O F
H O S P I T A L L E A S E S .

C H A P. III.

S E C T. I.

O f T A X E S, &c.

ALL hospitals are erected and maintained for the relief of the poor and afflicted:—Public and voluntary contribution is the source from whence the great expence of their laudable designs is defrayed:—The whole establishment is a work of mercy; and considering the extreme exigency of latter times, the liberality of the opulent is a monument of wonder to ourselves and to surrounding nations: however pressing may have been the demands of the state, however excessive may have been the luxuries and extravagance of the people in an age refined and polished as the present, still these charitable institutions have continually increased in

in number, in extent, and in wealth. But there are not many which have yet been so established as to become independent or careless of their annual contributions :— a large capital is necessary to be laid up, before even a moderate income can be secured ; and if their wants alone are all supplied, they must be said to flourish under the public favour !

From hence it should seem strange that any taxes should ever be levied upon hospitals : if it be contended, that every part of them, appropriated to the occupation of the afflicted, are exempted ; still there is a seeming injustice to charge the revenues of the institution, with a tax upon those apartments where the officers and servants are lodged : it would be of no benefit to a patient labouring under the severity of some malignant disease, to be carried to an hospital, and to remain unattended by nurses and proper persons appointed to restore or relieve him ; and these persons must necessarily be indulged with some moments of rest and relaxation : thus it is obvious, the servants of an hospital are as essential to it, as any other part of its administration ; and the directors would, for their own sakes, and the sake of its revenues, never employ one more than the immediate necessity of the case required : wherefore the legislature would do well, and it is here humbly recommended to them, to pass an act for the total exemption of all hospitals from the payment of any taxes whatsoever : if it be alledged, that this would throw the hospital's share of any tax upon the rest of the people, as it has been vainly argued ; it is fair and manifest to answer, that the burden, which thus would fall on each individual in any parish or district, is so minute, that if it were not pointed
out

out to him, he would never discover it in his annual expenditure; whereas, the whole share of every tax falls upon the hospital, and very uncharitably reduces its revenue, and takes away from the benevolent designs of its institution. I have thought proper to recommend this measure of exemption, from the sincerest motives of reason and conviction, and I leave it to wiser and more powerful heads to consider and mature:—Let us now see, how the law stands at present in this particular.

The annual acts passed for the land-tax, exempt the Land-tax.
two universities, the colleges of Eton, Winchester, and Westminster, the corporation for relief of poor widows and children of clergymen, the college of Bromley, and all hospitals in respect of the sites thereof or buildings within the walls or limits of the same:—And also the master, fellow, scholar or exhibitioner of any such college or hall, and any reader, officer or master of the universities, colleges or halls; and the masters, or ushers of any schools, in respect of any stipend, wages, rents, profits, or exhibitions whatsoever, arising to them in respect of their places or employments:—And also the lands which before 25th March, 1693, did belong to the sites of any college or hall, or to Christ's Hospital, St. Bartholomew's, Bridewell, St. Thomas's, and Bethlem, or any other hospitals or alms-houses in respect of any rents or revenues which before that time were payable to them, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and alms-houses only.—But tenants thereto, who by their leases are obliged to pay all taxes, are not exempted; they are to be rated on their yearly value above the rent paid to the hospital.

M

And

Anno 1693.

And in general it is provided that all such lands, revenues or rents, belonging to any hospital or alms-house, or settled to any charitable or pious use, as were assessed in 4th Wm. and Mary, shall be liable; and no other lands, &c. then belonging to any hospital or alms-house, or settled to any charitable or pious use, shall be charged or assessed.

All questions how far any such lands shall be taxed, to be determined *finally* on appeal, by three or more of the commissioners.

3 Eccl. Law,
315.

And the reason of this distinction, adds Dr. Burn, seems to be, because in that year, the sums to be charged were fixed and determined upon every particular division; lands which were then appropriated to charities being exempted out of the valuation: therefore it is no hardship upon the neighbourhood, that lands then exempted should be exempted still, for the other lands pay no more upon the account of such exemption: but if lands appropriated to charities since that time, should by such appropriation become exempted, this would lay a greater burden upon all the rest, because the same individual sum upon the whole division is to be raised still; but how great that burden would be, has been already considered.

Poor's Rate.
43 Eliz. c. 2.

2 Salk. 527.

All lands within a parish are to be assessed to the *poor's rate*. Hospital lands are chargeable to the poor as well as others; for no man by appropriating his lands to an hospital can discharge or exempt them from taxes to which they were subject before, and throw a great burden upon their neighbours. Per Holt, C. J.

Burr. 1053.

In the case of St. Luke's hospital, the above act and subsequent

subsequent decision, were greatly narrowed in their comprehensive extent; for there, it was determined by Lord Mansfield, in Mich. Term, 1 Geo. III. that the said hospital was not chargeable to the parish rates; and that in general no hospital is so, with respect to the site thereof, except those parts of it which are inhabited by the officers belonging to the hospital, as the chaplain, and physician; and the like in Chelsea hospital: And these apartments are to be rated as *single tenements*, of which the officers are the occupiers. The reason why the apartments in this hospital of the sick or mad persons, are not to be rated, is, that there are no persons who can be said to be the occupiers of them (and it is upon the *occupiers of houses* that the rate is to be levied); for it would be absurd to call the poor objects so with respect to this purpose; and the lessees of the hospital in trust for the charitable purposes to which it is applied, cannot with any propriety be considered as the occupiers of it; nor lastly, can the servants of the hospital, who attend there for their livelihood; and no other persons can, with any shadow of reason, be considered as the occupiers of it.

2 Burn. Eccl.
Law, 286.

It is upon the equity of this decision that the assessors have usually levied only upon the officers' apartments, in all the taxes assessed upon hospitals. But in the original act for levying a duty on inhabited houses, called the house-tax, there is a clause of exemption, without this reserve: and on that ground the Small-pox hospital was relieved *in toto* on appeal to the commissioners in 1787.

House-tax.

18 Geo. III.
c. 26. s. 35.
Rep. by 19 Geo.
III. c. 59.

In the commutation window act, it is declared, that

24 Geo. III.
c. 38. s. 35.

Commutation-
tax.

S. 31. and 32.

nothing therein shall extend to charge any hospital, charity-school, or house, provided for the reception and relief of poor persons, to the payment of the rate or duty imposed thereby, except such apartments therein, as are occupied by the officers or servants thereof, which shall be subject to the same duty according to the number of windows contained in each, as other inhabited houses are by the same act subject to. But chambers at either of the universities, or inns of court, are liable to the duties, as separate tenements.

I have been favoured by a friend with the perusal of the books of decisions of the judges and commissioners, on appeals made for over rates on the window duties, under the 20 and 21 of Geo. II. some of which are dated in 1775, 1778, 1779, 1780, 1781, 1782, and published for the commissioners use in 1782, and 1783; and the new act does not alter the nature of these decisions. Although there appear some determinations absolutely contradictory to each other, yet I have endeavoured to gather from them, some leading principles by which this matter may be clearly ascertained. The act exempts all houses for the reception of the poor, and therefore reasonably exempts the wards wherein they are lodged, and by analogy all other parts of the house used for their necessary accommodation; to receive a patient, and not administer to him daily food, can never be the intent of any such house of refuge, therefore the kitchen should be exempted, and every other place for depositing the needful supplies of the house; cleanliness is likewise an essential means towards recovery, the washhouse therefore should stand exempted, &c. &c. In July 1775, the twelve judges declared that all the offices, pantry, dining-room, cellars,

lars, &c. of the workhouse at West-Wycomb, and at Beamister, and at Windsor, the Magdalen hospital, &c. &c. were exempt, and charged only two windows in the master's or matron's chamber.

In 1779, the twelve judges went further, and exempted the workhouse of St Paul Covent Garden, from payment for the apartments of the master, matron, clerk, school-mistress, and the committee room: the officers were all hired yearly, and the rooms of the master and matron were only bedchambers.

The infirmary at Worcester was likewise discharged from this duty, on similar grounds, that the matron was the servant of the subscribers, had no property in the house, nor was there any officer or person therein that paid any parochial rate.

The act of 18 Geo. III. establishing a duty on inhabited houses, enacts that "no house shall within the intention of the act, be deemed or taken to be inhabited houses, except the same shall be inhabited by the owner, or by a tenant renting the same."

Tax on inhabited houses

At Drayton, in Shropshire, the free-school is detached from the master's dwelling-house; three of the judges in 1779, declared the latter chargeable and the former not so, to the duty on inhabited houses. And at Great Torrington, in Devonshire, the master's dwelling and the free-school, joined by a passage; the judges in 1782, declared him liable only for the part he inhabited.

The apartments of the officers in Greenwich hospital,

pital, are contiguous to, though entirely separate from any communication with those parts of the building appropriated to the objects of the charity, and are inhabited by the officers and their families; the commissioners had declared them chargeable to the house duty, but four of the judges in 1779 adjudged them exempt. This is expressly against the decision in 1749 of the twelve judges, who charged all the officers' dwelling-houses in St. Thomas's hospital; while the apartments of a matron, or master of a small hospital, who live and sleep in the adjoining rooms to the patients, are declared chargeable.

Under this act the register of Sutton's hospital (called the Charter-house) was rated for all the officers' apartments who were deemed necessary to the carrying on of its designs. It appeared that they had all for many years paid the window duty: the commissioners and eight of the judges declared them liable; another decision directly contrary to that of Greenwich hospital.

Where the dwellings of the officers have been detached from the poor-house or hospital, it seems notwithstanding to have been, in some cases, the chief cause of confirming the assessment; this was expressly so in the case of Wigston hospital at Leicester, where the communication was through the back yards of both buildings; the commissioners judging this a part of the hospital, exempted it; but four of the judges reversed their decision in 1780.

Winchester College was likewise assessed under the 19 Geo. III. the commissioners adjudged that this college,

college, in which is included the warden's house, rooms for the fellows, school, chapel, kitchen, brewhouse, &c. is under the same situation as the colleges at the universities, and adjudged them liable; which four of the judges afterwards confirmed.

But where any profit is derived to a school-master of any parish school, as in the case of the Brewers free-school, at Clerkenwell, who had liberty to take day scholars, for which he was paid independent of the charity; the judges declared him liable for his own apartments which were over the school-room in the same house.

In the act for levying a duty on servants, it is declared that nothing therein shall extend to charge any of the English or Scotch universities, the colleges of Eton, Winton, or Westminster, or the royal hospitals of Christ, St. Bartholomew, Bridewell, Bethlem, St. Thomas, Guy, or the Foundling: But though this clause is not extended by name to any other house for relief of the poor, the same reasoning which was established in the case of the poor's rate, and which most evidently produced the above exemption in the window act, is materially applicable and conclusive here; for though the servants are hired by the house-steward, they are not his servants, even though they obey his commands; they are not the servants of the individual governors, nor are they the servants of the poor wretches who come into the house for relief: and on whom then could the assessors distrain, if they should levy and the tax be unpaid? what name could they affix as proprietor of the goods they should seize upon? But the fact is,

Tax on servants.
25 Geo. III. c.
43. f. 9. and 10.

the assessors have not levied this tax upon hospitals ; for these difficulties are obvious ; but it is right to return their list, with some such answer as this, indorsed : “ No “ servants are employed here except such as are immediately concerned in the charity.”

Highways,

As to the *Highways*, there is no clause in any of the acts on that subject which refers to any hospitals. The general expression of “ all persons inhabitants of any “ parish or place, and keeping such teams or carriages,” bears a very different description from the character of any house, or its officers, supported for relief of the poor ; and therefore it is presumed, if for their convenience they were to keep a cart, it could not be taken to assist in the performance of *statute work* ; nor can any inhabitant of such a house be liable to compound for any proportion of labour, that should be assessed upon it. I remember an instance of the surveyors sending their usual notice under the act of the 13th of his present Majesty, to a house of charity near London, that they should attend at a place specified to receive the composition money of the landholders and inhabitants of the parish for that year ; but the steward of the hospital never paid any attention to it, and the surveyors never thought proper to present the neglect.

1783,

1 Haw. 202.

Indeed where corporations have by prescription, or for any consideration, been accustomed to repair highways, they will remain always liable thereto, even though they may have done it out of charity, or gratuitously, for any considerable time ; for what it hath always done, it shall be presumed, says Mr. Hawkins, to have been always bound to do,

But

But sometimes a charitable gift of lands has been formerly made to trustees, or to a corporation, to repair highways; here the trustees are bound to let the lands at the most improved yearly value *without fine*: and the justices may inquire into their value, and order the employment thereof according to the will of the donor (except such lands as are given for such uses to either of the universities, which have visitors of their own): and in such case the surveyor's notice goes to the occupier or to the trustees. And in the case of *Harrow School*, ^{7 Geo. III. c. 42. s. 14, 33.} ^{2 Vezey, 551.} the court did not choose to interpose, though the trustees had laid out the money in repairing a different part of that road, not exactly pursuant to the will; but then they were invested with very extensive discretionary powers; and it did not appear they had acted corruptly: but the court would not dismiss the information.

S E C T. II.

Of L E A S E S, &c.

I come now to speak of leases of hospital lands; the terms of which are restrained by several statutes.

The act of Hen. VIII. for leases of hospitals, colleges, and other corporations, states, that by the common laws of this realm, all assents, elections, grants and leases made and granted by the majority of the chapter or fellows, or brethren of any cathedral church, hospital, college or corporation, by whatsoever name incorporated, were as effectual as if the whole body assented thereto; yet
divers

^{33 Hen. VIII. c. 27.}

divers founders had made, among their peculiar acts, local statutes, that if any one should dissent, no such lease, election, or grant should be made; to which they had been sworn, and so the residue could not proceed to the perfection thereof, without the danger of perjury; for avoiding whereof, and for the due execution of the common law universally within the realm, and every place, in one conformity of reason to be used; it is ordained, that every peculiar act or statute made by any founder, at the foundation, whereby the grant, lease, gift, or election of the governor or ruler, with the assent of the majority, having voice of assent, should be in any wise hindered by any one or more of the lesser number contrary to the common law; should be as to such statute void: and no person of any such hospital, college or corporation, should from thenceforth be compelled to take an oath for the observing such order or statute, on pain to the person giving such oath, to forfeit 5l.

13 Eliz. c. 10.

11 Co. 76. a.

The statute having thus confirmed the common law, in the power, which reason also ascribes to the majority of every society, in all their acts, and particularly in those of leases, elections, grants, and the like; the next act we meet with on this subject was purposely made to restrain long leases of ecclesiastical lands; yet it has always had a benign and favourable construction, and therefore has been held to include *all manner of hospitals*, be they incorporated by any name, or be they sole or aggregate. "All leases, gifts, grants, feoffments, conveyances or estates, to be made or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, or master or guardian of any hospital, parson, vicar, &c. of any houses, lands or
I tenements,

tenements, being part of the possessions thereof, other than for 21 years or three lives from the time any such lease shall be made or granted, whereupon the accustomed yearly rent or more, shall be reserved, and payable yearly during the term, shall be utterly void." But the act does not extend to make good any university lease for more years than are limited by the private statutes of any college. Nor to any new lease made on the surrender of a former lease, or by reason of any covenant or condition contained in any lease then continuing; so that the new lease do not contain more years than the residue of the former, then continuing, shall be, at the making of such new lease, nor at a less rent. But a subsequent statute which continues the above, declares, that this shall not extend to any grant, assurance or lease of houses belonging to any such college, hospital or corporation, which houses are situate in any city, or town, or suburbs, but that the same should be granted as thenceforth, according to the common law or statutes of such institution; so that such house be not the capital or dwelling-house, used for the habitation of the persons abovesaid, nor have ground thereto belonging above ten acres:—Provido, that no lease shall be made by force of this statute in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations, nor for longer term than forty years at the most; nor any houses shall be permitted to be aliened, unless in recompence thereof there shall be afore, with, or presently after such alienation, good, lawful and sufficient assurance made in fee-simple, absolutely, to such colleges, *houses*, bodies politic or corporate, and their successors, of lands of as good value, and

Continued by
16 C. I. c. 4.
14 Eliz. c. 11.
s. 17.

Continued by
39 El. c. 18.
f. 13, 41.
16 Car. I. c. 4.

and of as great yearly value at least, as so shall be aliened.

Gibf. 737.

If a corporation aggregate makes a lease not warranted by this statute, it is void against themselves.

5 Geo. III.
c. 17.

And now to settle all doubts relative to their power of granting leases of tythes, or incorporeal hereditaments, and remedy for rent in arrear; a late act declares all leases thereof made for one, two, or three lives, or for 21 years, good in law, and gives power to sue by action of debt for all rent in arrear.

11 Co. 76. a.

This action of debt against the lessee is given to secure the corporation, under any lease of tythes or other incorporeal hereditament, which was well calculated for the benefit of ecclesiastical preferments, because there was no place wherein any distress could be taken; but it has been already said that the expression of "Master" and "Guardian of Hospitals," which are also found in all these acts, include all manner of hospitals, and therefore it is here mentioned, for their benefit likewise.

4 Geo. II. c.
28. f. 6.

It is also held, that the old lease may be surrendered though there are undertenants in occupation: and to obviate the difficulty of surrendering up all the under leases, the surrender of the original is made equally valid, and a new one may be granted thereon.

Watf. c. 42.

The acts recited, certainly restrain any corporation from wholly *alienating* any of their lands or tenements; for not only the word *lease* is mentioned, but also all *gifts, grants, assurances, and conveyances*, are restricted to three lives, or 21 years.

If

If a lease for years be made to a corporation, who cannot take it without deed, and they grant it over, the grantee may entitle himself thereto, without shewing the deed; because the lease of the thing in its nature might have passed without deed; although the persons who took it could not take it without deed; also his possession is some privilege for his title. But note; this decision was prior to the statute of frauds, 29 C. II. c. 3. whereby leases, except for three years, are directed to be in writing. Cro. Ja. 110.

The Court of Chancery will not compel an hospital to renew a lease, upon certain terms, under two years reserved rent. The discretion is only, that they should not increase their fines, by taking two years rent; but not to prevent their taking one year's rent, though it shall amount to more than formerly. A perpetual renewal upon particular terms, would be equivalent to an alienation. Bro. Cha. Rep. 62.

Such is the general doctrine of leases granted by hospitals; and though hospitals and the sites thereof, are exempted from land tax, and several other public contributions, from the humane principle of not reducing their charitable fund; yet this is no argument to exempt hospital lands, granted out in leases, whereby a yearly profit arises to the house, from such payments; and though it may have been urged in some cases, yet there is no colour for extending the construction of any of the statutes made for supplying the revenues of the crown, beyond the walls of any house of charity.

O F

V I S I T A T I O N.

C H A P. IV.

THERE is no constitution established in society, without a power being vested somewhere, either declared or implied, for redressing its grievances or abuses: In nations, this power generally belongs to the party invested with the executive branch of government: in small inferior communities, it often depends on the will of their founders, not repugnant to the laws of the land; or when this is not declared, the right devolves upon the executive power of the realm.

2 Vezey, 328.
1 Burn. Ecc.
Law, 426.

2 P. Wms. 326.
And see further,
1 Vezey, 472.
Green v.
Rutherford.

The power of a visitor is arbitrary, and yet conclusive in the first instance; all fundatory rights arise from the property of the donor: a founder has the nomination of his visitor, and unless he dispose of this power, it remains to his heirs; and if he die without heirs, it goes to the crown. A founder, or his heirs (if he does it not), may make a visitor; may give him partial or general powers; if partial ones, and he exceeds them, that excess becomes a nullity, and lets in the law; and the court, whether they can give relief or not, will see that these jurisdictions keep within their bounds, and will grant a prohibition,

hibition, where there is such excess of power, as well as where there is no power at all. For though the king's courts cannot interfere with regard to the private statutes of the society as established by the founder; yet as to the public laws of the land, they may; for over these the founder could give to the visitor, no exclusive jurisdiction.

1 Burn Eccl.
Law, 417.
4 Mod. 233.
Viner Man-
damus. H. II.
Str. 1139.

The power of a visitor, though a summary one, is certainly very convenient: the exercise of it is in no case more so, than in that of elections. When the proprieties and disqualifications of candidates are to be determined; what confusion would be made, if these were to be determined by the common law, and the party who had the right, were kept out of the profits in the mean time!

St. John's Coll.
v. Toddington.
1 Burn. Eccl.
Law, 429.

It was formerly held, that if the hospital be *spiritual*, the bishop should visit; if *lay*, the patron. This right of lay patrons was indeed abridged by 2 Hen. V. c. 1. which directs, that the ordinary should visit *all* hospitals founded by subjects; though the King's writ was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by 14 Eliz. c. 5. which directs the bishops to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded under 39 Eliz. c. 5. are to be visited by such persons as shall be nominated by the respective founders; and if they appoint nobody, then by the bishop of the diocese. It was laid down as a rule, that where the King is founder, he and his successors are visitors; but where a private person is founder, there such private person and his

Year Book.
8 Ed. III. 28.
8 Aff. 29.

1 Bl. Com. 482.
2 Inst. 725.
2 P. Wms. 326.

2 P. Wms. 326.

2 Wil. 325.
2 Vezey, 552.
Duke, 69.

2 P. Wms. 326.

See Duke, 68.
69.

his heirs are, by implication of law, visitors ; who may substitute their visitatorial power to any other person, or his heirs : but where the founder appoints no special visitor, the visitatorial power results to his heir. And the commissioners instituted by 43 Eliz. c. 4. had power to visit, in case the visitors appointed by the donor misbehaved (but here the power of the ordinary was still reserved) ; for it would be unreasonable and of mischievous consequence, that where governors are appointed, these, by construction of law, and without any more, should be visitors, should have an absolute power, and remain exempt from being visited themselves : and therefore in those cases where the governors or visitors are said *not to be accountable*, it must be intended where they have the power of government only, and not where they have the legal estate, and are entrusted with the receipt of the rents and profits ; for to be unaccountable in such a case, would be such a privilege as might of itself be a temptation to a breach of trust.

1 Vezey, 418.
2 Vezey, 329,
552.
10 Co. 31.
2 P. Wms. 327.

Str. 797.
2 P. Wms. 327.

And although in many charities, some of the governors are appointed by the rules and orders to be visitors, yet the word *governor* does not of itself imply *visitor*, or give any power of visitation ; but they are not, having the legal estate vested in them, therefore excluded from being visitors : such a forced construction might prove of very great prejudice to the charity ; and besides, would be making either a charter of incorporation, or a founder's liberality, of double intent, which ought not to be. And in general where governors happen to unite the capacity of visitor, in the same person, it is for the management of the house or affairs of the charity ; and then they remain accountable to the King's courts

for

for the estates and revenues which may come to their hands. 3 Atk. 164.

Since the 43 Eliz. where there is a charity for the particular purposes therein mentioned, and no charter, unless a particular exception out of the statute, it must be regulated by commission; but where there is a visitor it is otherwise. But there may be an application to the court, founded on its general jurisdiction; and that is from necessity, because there is no charter to regulate it, and the King has a general jurisdiction of this kind: there must be somewhere a power to regulate: but where there is a charter with proper powers, there is no ground to apply to the court to establish that charity; and it must be left to be regulated in the manner the charter has put it, or by the original rule of law. It has been determined, and expressly in the case of the *Birmingham school*, that there is no technical form of words for granting a visitatorial power, but it may be by any words of that meaning.

2 Vezey, 328.
Atty. Genl. v.
Middleton.
1751.
2 Vezey, 552.

New College, Oxford, having, by a charter, particular powers given them as to the grammar school at *Bedford*, such as removing the master for misbehaviour, &c: As to any thing of that kind, Lord Chancellor Hardwicke thought, it would be too much for the court to do any thing, though they were not appointed general visitors: but as to the management of the revenue of the school, the court might; and interposed and rectified an abuse therein accordingly.

2 Vezey, 505.
Atty. Genl. v.
Corp. Bedford.

Schools and colleges are said to be under similar restrictions as to their visitors. Colleges in the univer-

Burn Eccl.
Law. 312.

Ld. Raym. 5.
4 Mod. 106.
Skin. 447.

Str. 58.
1 Vezey, 80.

Duke, 68, 69,

ties, whether founded by the King or any other person, are yet to be considered as private establishments, subject only to the founder, and to the visitor he appoints. The whole difficulty in coming to this decision seems to have been, to determine whether they were of a public or private nature: and though the courts have granted that such institutions are of a public nature as are constituted by the crown, and for public government, and are subject to the jurisdiction of the King's courts of common law; and for that reason have granted Mandamus to restore a schoolmaster of a grammar school; yet if they are judged matters only of a private charity, then they are subject to the rules and statutes of the founder and his visitor, and no other.

Visitation was not introduced by the canon law, but of necessity, was created by the common law. Patronage and visitation both rise from the founder; and the office of the visitor by the common law, is to judge according to the statutes of the college (or charity), and to expel and deprive upon just occasions, and to hear appeals of course: and from him, and him only, the party grieved ought to have redress; and in him the founder hath reposed so entire a confidence that he will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever.

A college is a temporal or lay corporation, of the same nature with an hospital; thus they are generally named together in the acts already cited: although corporations for public government, which have no particular founders or special visitors, are subject to the King's courts; yet corporations for charity, founded
and

and endowed by private persons, are subject to the rule and government of those that erect them. But where the persons to whom the charity is given are not incorporated, there is no such visitatorial power, because the interest of the revenue is not invested in them; the King by his charter incorporates, and thereby grants to them the rights belonging to persons, as to legal capacity; colleges, although founded by private persons, are yet incorporated by the King's charter; but although the Kings by their charters made the colleges to be such in law, that is, to be legal corporations, yet they left to the particular founders, authority to appoint what statutes they thought fit, for the regulation of them. And not only the statutes, but the appointment of visitors, was left to them, and the manner of government, and the several conditions, on which any persons were to be made or to continue partakers of their bounty; all which constitute them of a private nature; and the courts of law will not interfere in the examination of any of their private acts. And although the court proceeded to take cognizance in Dr. Bentley's case, yet it was not to interfere with the visitor's power, but because no visitor was set forth in the return to the Mandamus, to restore him to his degrees in the university of Cambridge. The court will always grant a Mandamus to restore a person improperly deprived of his office, although the constitution of the society be established by charter, and confirmed by act of parliament, provided no visitor is constituted thereby; for if there is a visitor appointed, the party grieved may make his application there for redress: so if a Mandamus is granted to restore a fellow of a college, and they return a visitor, though his sentence is irregular, yet it is not

2 Still. Ca.
Exeter Coll.
Stra. 557.
Ld. Ray. 1334.

2 Atk. 108.

examinable by the court. It is the same as to a charity-school, where local visitors are appointed: if it is a private foundation, he and his heirs alone have a right, as to its internal government.

Str. 1139.

1 Burn Eccl.
Law, 419.

Ante, 156.

1 Vezey, 78:

And the court requires to be certified, by the return to their writ, whether there is a visitor appointed by the founder, or not; and will not admit evidence thereof by affidavits. A visitor for a particular purpose cannot, because he is so, be a general visitor. But Lord Mansfield said, in the case of *St. John's Camb. v. Toddington*, That a founder may delegate his visitatorial power, either generally or specially: He may do this either by general words, or he may prescribe a mode for the exercise of any part of this power. But if a mode of visitation is prescribed in any particular case, that will not take away the general powers incidental to the office of a visitor; of which powers that of determining concerning elections hath been held to be one. No set form of words is necessary: you must look into the whole tenor of the statutes, to see whether the power be given, or intended to be given. A founder may split this power into a number of statutes for particular cases, and the court may consider upon the whole, who is general visitor, as in the case of *Clare-hall, Atty. Gen. v. Talbot*, 1747. It is clear a founder may appoint a visitor with general powers, and yet except particular powers in particular cases. To visit as ordinary, and to visit an eleemosynary foundation, are different things. If a founder appoint no visitor, it goes to the crown. The mode of donation is the law of it. And his Lordship doubted whether a visitor can make any new statutes, unless power be specially given him for that purpose.

The

The Archbishop has a power of visitation generally over the two universities, in his metropolitical capacity; the King's superior right being nevertheless reserved.

Free chapels and donatives, except such as receive the augmentation of Queen Anne's bounty, are exempt from the visitation of the Ordinary; the first being visitable only by commission from the King, and the second by commission from the donor: and such churches and chapels also as by 25 Hen. VIII. c. 21. being formerly in the visitation of the Pope, are now vested in the crown.

Governors of a charity though not guilty of corruption, yet if extremely negligent in any case, will be liable to costs, on any application to the court. 2 P. Wms. 284.

If trustees are directed to be inhabitants of a parish, and trustees be chosen out of another parish; before the court will order them to be removed, it must be shewn that there were proper persons in the parish to be trustees. Bro. Cha. Rep. 439.

Trustees are bound to do the best they can for the charity they engage to serve: it was adjudged a misemployment, where they did not lease certain tythes left for charitable purposes to their full value; they were ordered to pay the difference, and the lease declared void, and a new one ordered. Duke, 56, 58.

It will be accounted a misemployment of a gift, in all cases where there is found any breach of trust, falsity, nonemployment, concealment, misgovernment, or con-

version of the lands, rents, goods, money, &c. bestowed, against the intent or meaning of the donor or founder; as to cut down and sell timber; to grant leases at an under rent; to retain monies, rents and profits in a receiver's hands; to convert or change the employment thereof to other uses than those directed by the giver or founder; extravagant management and waste in the house, &c. &c. But where the gift is general, as is commonly the case, in the words "towards carrying on the charitable designs of the institution named," there, it is no misemployment to dispose of the gift in any manner the governors think proper, within the general concerns and for the benefit thereof; for this includes their discretion, to employ it in the best way they can, for the supply of those necessities which either the house or the poor require, in payment of salaries, and the like: but if the donor specify any one of these particulars, it must be so strictly employed.

And perhaps if visitations were oftener held, to examine into the conduct and management of these institutions, as well as any infractions of the statutes given by the founder; the public support and encouragement might be better deserved and more liberally bestowed.

Upon the whole, the subject of visitation may be reduced to these principles.——

That in all institutions of a public nature, for public government, founded by charter from the crown, the King is the general visitor.

That in all private institutions (the distinction has
4 already

already been fully explained) the founder and his heirs, or the person whom he or they shall appoint, is visitor. And in default of such appointment, this visitatorial power vests in the crown.

That the visitor's power is conclusive, to redress all grievances, and decide all differences, elections and the like, on appeal, which must be made to him. That his decisions are without further appeal, but must be agreeable to the statutes of the institution, and the laws of the realm; and if otherwise, they are then examinable by the King's courts.

And that wheresoever the King is visitor, or where no visitor is appointed, all such differences are likewise cognizable by his courts at Westminster Hall.

C O N C L U S I O N.

THE foregoing pages have been put together, with a view to arrange the law as it now stands, relative to Charitable Institutions; the great increase of them at this period seemed to call for a work of this kind; the design has been, chiefly, to make the way clear before those who, through their benevolence, might have in view the establishment of any new society of this nature, or who might be induced to continue their liberality in the promoting the welfare of any one already established: to render their bounty more effectual, by representing those restraints, which, the above short view of the history of *Mortmain* has proved, it was necessary for the legislature to impose; and thereby, guarding them from devising lands, bequeathing legacies, or acting in charitable trusts contrary to the spirit of those restrictive laws; and to shew that those restrictions are purely to prevent improvident alienations of landed property.

If this design may have its utility in any one instance; either in the private leading of the benevolent mind to appropriate his good deeds, or in the open direction of any charitable society, the Author's pains will be amply rewarded.

It is his boast and constant satisfaction, that fortune has placed him in a situation, where much of the administration of one of these communities devolves to his care, where he is constantly eye witness to the most humane and unremitted assiduity, in the cure of the most loathsome,

some, contagious, and fatal disease; without one superfluous expence, one misapplication of the revenues, or one cause of public complaint; and where the method simple, but important in itself, with which Providence has blessed the present century, of preventing, by a slight indisposition, the calamities of the natural disease, is permanently established. But it would be vain to indulge expressions of praise, however justly due, where the utility and humanity of the institution is so publicly and universally acknowledged.*

Affiduity in the head, generally produces activity in the other departments; if the Author has had the good fortune at any time to render himself useful, his humble exertions have been derived from the encouragement of many able and opulent friends, to whose favour he desires now to offer his sincere tribute of acknowledgment; and he feels the force of their kindness the more sensibly, in that a new chain of reflection has occupied his mind since his present engagement, which has opened to him a scene of constant humanity, and of public benevolence; and has proved to him, that the people of this country do not live for themselves alone. Urbanity and compassion, are benign traits in the English character, more desirable and more glorious, than all the exalted dignity of continental pride; for here, amid the luxuries of affluence and ease, the sufferings of the afflicted are relieved; and the same heart that rejoices in the hour of merriment, disdains not to turn aside, and drop a tear and an alms, to wipe away the distresses of the unfortunate!

* The Small Pox and Inoculation Hospitals.

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 P. 9. l. 16. correct *added*.
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 P. 89. l. 6. add in margin, *Atty. v.*
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Lord Chancellor Camden held,

1. That leases renewed after the making of a will, shall pass by a devise in it, if the words of the will give the benefit of renewal, as Lord Hardwicke decreed in the case of *in Atkyns*: but that in this case on Sir Joseph Downing's will there was a want of words to include the benefit of renewal.
2. That, though the court will supply the want of a surrender of copyhold in the case of an immediate devise to a charity, ~~but~~ yet this shall not be done in the present case, where the charitable devise is in remainder after several estates for lives & in tail, ~~the~~ in possession.
3. That a will may be republished, by a codicil with words in it importing an intention to republish, or by the annexation of a codicil to a will, that being a consolidation of them: but that in the present case, there being neither the one nor the other, the will codicil was not a republication of the will.

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